Commentary

ON

THE HINDU LAW

OF

Inheritance, Succession, Partition, Adoption, Marriage, and Stridhan.

BY

JOGENDRA SMARTA SIROMANI, M.A., B.L.,
OF THE CALCUTTA UNIVERSITY, AND OF THE COLLEGE OF PANDITS, NADIYA;
AUTHOR OF "VYAVASTHA KALPADRUMA."

Calcutta:
THACKER, SPINK AND CO.
BOMBAY: THACKER & CO., LD. MADRAS: HIGGINBOTHAM & CO.
LONDON: W. THACKER AND CO.

1885.

CONTENTS

Chapter I.

INTRODUCTION.

Chapter II.

Chapter III.

MARRIAGE.

Chapter IV.

ADOPTION.

Chapter V.

JOINT FAMILY AND JOINT OWNERSHIP.

Chapter VI.

WILLS.

Chapter VII.

PARTITION.

Chapter VIII.

MAINTENANCE.

Chapter IX.

LAW OF INHERITANCE (MITAKSHARA).

Chapter X.

LAW OF INHERITANCE (DAYABHAGA).

Chapter XI.

NATURE OF THE ESTATE TAKEN BY FEMALES IN PROPERTY INHERITED BY THEM FROM MALES.

Chapter XII.

STRIDHAN.

. TABLE OF CASES CITED.

INTRODUCTION.

CHAPTER III.—Marriage.

CHAPTER IV.—Adoption.

CHAPTER V.—JOINT FAMILY AND JOINT OWNERSHIP.

CHAPTER VI.—WILLS.

CHAPTER VII—Partition.

CHAPTER VIII.—MAINTENANCE.

CHAPTER IX.—LAW OF INHERITANCE, MITAKSHARA.

CHAPTER X.—LAW OF INHERITANCE, DAYABHAGA.

CHAPTER XI.—ESTATE TAKEN BY FEMALES.

Page

CHAPTER XII.—STRIDHAN.

INTRODUCTION.

HINDU JURISPRUDENCE.

SECTION I.

THE EXISTENCE OF HINDU LAW.

According to modern European Jurists, Law is the command which the Sovereign power, in a political society, imposes on the subjects or members of the society. As the Hindu Codes do not profess to embody the commands of any king in earth, it might seem that the Hindus had never such a thing as can be called their law. An English writer cynically asks, "Has any such thing as Hindu Law at any time existed in the world, or is it that Hindu Law is a mere phantom of the brain imagined by Sanskritists without law, and lawyers without Sanskrit?" These questions are not asked in such manner as to require an answer. But opinions similar to those, implied in them, are entertained by some of the most eminent English lawyers. Sir Henry Maine, in his Treatise on Ancient Law, observes that "the Hindu Code called the Laws of Manu which is certainly a Brahmin compilation, undoubtedly enshrines many genuine observances of the Hindu race; but the opinion of the best contemporary orientalists is, that it does not, as a whole, represent a set of rules ever actually administered in Hindustan. It is in great part an ideal picture of that which, in the view of the Brahmins, ought to be the law." (Ancient Law, pp. 17, 18.) As the very existence of any such thing as Hindu Law has been thus questioned, so in dealing with the subject, it is necessary to shew, first of all, that such a thing does exist. If there is no such thing as Hindu Law, then it cannot be possible to write a book on the subject. But the Legislature has recognized the

Doubts entertained by some English lawyers as to the existence of Hindu Law.

existence of Hindu Law; and it can be shewn easily that the Courts of Law were entirely in the right, in taking for granted that that law is contained in the Codes of Manu, Jagnyavalkya &c., and in the Digests of Jimutavahana, Vigyaneshwar, and other authoritative writers.

The Hindu Codes do not embody the commands of any sceptered monarch.

2. It is true that our Codes do not embody the commands of any sceptred monarch. It cannot be denied that the authors of our Codes were Brahmins, who neither occupied the throne, nor always stood in the same relation to it, as the Law Member of the Supreme Legislature does to the Sovereign power of the realm at the present time. But it must be conceded by every one, who knows anything of the mechanism of our society, that the Brahmins were the real rulers of the country, so long at least, as Hindu kings occupied the throne. The Brahmins never professed to say to the people "these are our commands, you must obey them." From motives of policy, they claimed to be divinely inspired. But whatever be the source, from which they professed to derive their Codes, the rules, enjoined therein, were in fact commands imposed by them on the people, who generally obeyed them. In case of disobedience, the Brahmins themselves sometimes enforced their laws, by inflicting such punishments as degradation or excommunication. Sometimes, the king and his servants, enforced those laws by temporal punishment. No one, professing to be a Hindu, could assert that the laws and rules, prescribed by the Vedas or the Sanhitas, were not binding or obligatory. Even crowned heads acknowledged the authority of those laws; and thus practically submitted to the Legislation of the Brahmins.

But they do embody the commands of the Brahmins who were the real rulers of the country, in many respects.

3. According to Austin's definition of law, it is the command of the Sovereign power. But the person who occupies the throne or to whom the people pay taxes, is not necessarily the Sovereign. The native kings, whether Hindus or Mahomedans, very seldom interfered in the internal affairs of the country. Under them, the people were generally at liberty to manage the affairs of their society. The native kings waged wars and raised taxes; they had great power in the country. But either on account of ignorance or fear they never attempted to rule the people. Within the limits of the Hindu community, the Brahmins enjoyed supreme Legislative power; and the commands, imposed by them, were generally obeyed.

Even when the Mahomedans were in the zenith of their power, the Brahmins exercised some of the most important functions of sovereignty, without any molestation. It is only the influence of British rule, that has well nigh deprived the Brahmins of those powers which they enjoyed from time immemorial.

4. If the will of the Sovereign is law, then it follows, as a matter of course, that it is in the power of the Sovereign to change the law as often as he likes; and no person or body of persons can be considered as having sovereign power, unless such person or body of persons have power to change the law. In this country, the Brahmins professed that their law is derived from the Vedas, that the Vedas are in existence from the beginning of time:

न कश्चिद्वेदकर्त्तासीत् वेदस्मर्त्ता पितामहः ।

The process by which Hindu Law has been modified and developed by the Brahmin Legislators.

Such being the theory, it might seem, that they could not change the law. But practically the Brahmins modified the law, from time to time. It is true that they never assembled together to pass new laws or to modify old ones. But what they did, practically amounted to the same thing. When a pundit becomes more than ordinarily famous for learning, and his fame attracts large numbers of pupils, any book written by him and recommended for use to his pupils, becomes the text book on the subject. If the new book is decidedly a better one, than those in use before them, it supersedes the old ones. It is in this way that the Mitakshara superseded the works of Bhoja Deva, Bishwarupa, and Srikar, and it is in the same way that the Dayabhaga has superseded the Mitakshara in Bengal. The pundits in this country generally read but one book on a subject carefully. When the art of printing was unknown, it was not possible for students to have too many books. The student copied with his own hand the book he was required to read; or engaged a scribe to do the work of copying for him. It is not therefore difficult to see that, generally, it was not possible for the pundits, in this country, to have a large supply of books. Such being the case the particular book, which they study, is generally their sole book of reference. Whenever they are called upon to give an opinion or to decide any dispute, they generally refer to that book and that book

alone. There are some pundits, who being descended from a long line of illustrious ancestors, have a large supply of books. But even these latter generally accept that book as authoritative, which is in general use in the country. The particular legal treatise, which is in general use, thus acquires all the force of a legal Code passed by the Sovereign power; and until that particular book is superseded, it is practically the Law of the land. The rules and precepts, enjoined in it, are generally obeyed; and those who wilfully violate the same are punished by being required to perform some penance or other, according to the nature of the crime.

The Sanhitas are Codes of law and not ideal pictures.

5. From what has been stated above, it would now appear that the Codes of Manu and Jagnyavalkya do not represent a mere ideal picture.* Some of the rules and precepts contained in those Codes are declared as obsolete in the present age, and these may be said to be repealed. But a large number of those rules are still in force though differently interpreted in the different Schools. Practically, however, the Digests of Vignyaneshwar, Jimutvahana and other authoritative writers contained the law which governed Hindu society at the time of the commencement of British rule; and the English Courts of Law rightly accepted those Digests as their guide in administering Hindu Law.

SECTION II.

THE FOUNDATION OF HINDU JURISPRUDENCE.

The basis of Brahminical Jurisprudence.

1. It must be admitted that Hindus have such thing as law, even as defined by Bentham and Austin. The question next arises what is the source or foundation of that Law? It is not within the scope of this work to enter into an elaborate enquiry, regarding the history or basis of Brahminical Jurisprudence. In this work, the question can be dealt with only so far as is necessary to enable the practical Lawyer to have an insight into the true nature of Hindu law.

* See the chapters on marriage and adoption.

2. In all civilized countries, at the present time, the work of Legislation is done by the Sovereign or by a legislative body appointed by the Sovereign. Legislation has, in modern times, no connection whatever with any revealed scripture. The theory at least is, that the law should be such as to conduce to the greatest good of the greatest number of men in the society. Whatever difference of opinion there may be, as to the principle of utility being the foundation of morality, it is now generally accepted that all legislation must conform to that principle.

The principle of utility is the basis of legislation in modern times.

3. The principle of utility being recognized as the proper foundation of law, it becomes absolutely necessary that the work of legislation should be done by the Sovereign power. The principle of utility requires that when a party, capable of suing, has a cause of action, he ought to sue within a certain time; and that after the expiration of that period, the legal remedy ought to be barred. But on the principle of utility, it cannot be determined what the exact period should be. The exact period can be fixed only by the will of the Sovereign power. Legislation is therefore considered as absolutely necessary in such matters. The Sovereign declares his will; and that declaration is accepted as law by the Courts which administer justice.

The necessity of legislation by the Sovereign.

4. In the archaic times, however, nothing could be more dangerous than to accept that the king can make laws or can alter them by his arbitrary will. At a time when kings and emperors were generally little better than heads of banditti, the Sacred Scriptures, and the rules contained in them, were almost the only safeguards against the greed of the king. If the king, in such a state of society, be told that he has the power to make and alter laws, then there would be no end of tyranny and oppression. Great concessions are made in favour of the throne in the ancient Codes. But so far as legislation is concerned, the king is placed on the same level with the other members of the body politic The learned and thoughtful men in the country, find it absolutely necessary to keep the king in awe, and to control his acts. It is only when law and order are firmly established, when the people become capable of judging what is conducive to their interest, and what is not, that it becomes possible to accept the will of the king as law, for then the

The principle of utility cannot be accepted as the basis of legislation in the archaic state.

king can well see the danger of passing a law which is not conducive to the good of the people, and which is likely to make them discontented.

Almost all the ancient systems of jurisprudence are founded on revealed scriptures.

5. Whatever be the reason, the principle of utility was not distinctly recognized in ancient times in any country. It is true that the authors of the ancient Codes must have occasionally perceived the truth of that principle. But they never openly avowed what they must have felt in their mind. Almost all the ancient systems of jurisprudence, are ascribed to direct revelation of the Deity; and considering the state of things, in those ages, it is no wonder that the learned men of the time, placed the rules of law and morality on such foundation. When the people were generally in the darkness of ignorance, nothing could be more difficult than to make them understand the true nature of the principle of utility, or to decide what rules conform to that principle and what rules do not. In primitive times, the people can be made to conform to the rules of law by being made to believe that those rules rest upon the command of the gods who can make men happy or miserable as they choose. But the principle of utility is one which it is impossible for the uneducated to understand or to apply in practice in order to determine what is right and what is wrong.

The belief in the infallibility of the sacred scriptures productive of salutary results in the archaic state.

The belief, in the infallibility of the sacred Scriptures, is generally productive of incalculable good, in the primitive state. By the weakening of that faith, the fabric of society very often runs the risk of being shaken to its foundation.

6. There are moralists who say that we know, by intuition, what is right and wrong. But any number of instances can be cited from history to show that, in every age, in every clime, the most atrocious crimes have been perpetrated in the name of religion and God, but in reality to serve the selfish purposes of the authors of those crimes. Very often they play so successfully, that not only contemporary people, but several successive generations, are made to believe that there could be nothing wrong in their acts. Sometimes the people are duped so far as to admire, nay to worship, them for those very acts. The result is that some of the worst crimes are no longer looked upon with disfavour nor abhorrence; and ultimately the very existence of the society is threatened

Such things are possible when the people are not generally well educated, and when they are unaccustomed to think for themselves. Under such circumstances a great deal of good is done, by a general belief in the infallibility of the Shasters. In a stationary society, the belief cannot be easily shaken, when once established. Though such belief materially hinders the progress of society, yet on the whole it exercises a great deal of wholesome influence. Considering all these circumstances it is no wonder that the learned and thoughtful men, in ancient times, professed that their legal Codes were derived directly from the Deity. The fact is, that they could not enforce obedience in any other manner.

The probable origin of what are considered as revealed scriptures.

7. In the very beginning of society, certain rules became recognized as binding on the members of it. With the progress of social life these rules are gradually developed and improved. For generations, they are handed down by tradition. At last, when the art of writing is invented, then these rules are embodied in the form of books. The learned men, who do the work of compilation, can easily persuade themselves and others, to believe in their divine origin and infallibility. A great deal of time having elapsed from the date when the rules were first formulated the task of self-deception becomes an easy one.

The reason why Hindu kings submitted to the legislation of the Brahmins.

8. Whatever be the cause, the Vedas came to be regarded as infallible in this country. The Codes of Manu, Yajnyavalkya, and the other Rishis being supposed to be derived from the Vedas, the rules and laws, contained therein, are regarded as equally infallible and binding. The Sanhitas are in fact the legal Codes, to the authority of which the Hindus submitted without question. The Hindu kings never pretended that they had any power to modify the law of the Brahminical Shasters. The Kshatriya kings and chiefs very seldom cultivated letters. Partly from policy and partly on account of their religious faith they never took upon themselves the work of legislation, even if the Kshatriya kings ever perceived the hollowness of the Brahminical pretension to superior sanctity and divine inspiration, still it was evidently their interest to accept the rules and precepts enjoined in the Vedas and the Sanhitas. For those very rules required that the Brahmins should keep aloof from worldly concerns.

9. Whatever might have been the reason or motive, the fact is that as a general rule Kshatriya kings submitted to the legislation of the Brahmins, and they never asserted that the king as such has any power to lay down rules of conduct, for the subjects, which are at variance with the Brahminical Codes.

The reason why the Brahmins relied throughout on the revealed scriptures.

10. From the earliest times, the Brahmins attained a very high degree of culture. As a body they were very powerful. But they professed utter indifference to the affairs of the world. If the learned Brahmins took an active part, in the administration of public affairs, they would probably have recognized that the king alone ought to have the power of legislating. But their ambition was too high. They not only aspired but actually succeeded in having themselves revered as representatives of the Divinity in earth. It was exceedingly distasteful to their proud nature to stoop from the high position which they held, and to submit to the drudgery of office. Motives of policy as well as real love of letters, led the early Brahminical writers to lay down the rule that the cultivation of letters is the only proper avocation of a Brahmin. They were therefore vitally interested in maintaining the divine origin and infallibity of their Shasters. Even if they perceived, as they must have done sometimes, that the doctrine of utility is the only test of right and wrong, still they could not openly recognize it, as the sole basis of their legislation without inflicting a death-blow on their power. Motives of self-interest, as well as wise statesmanship confirmed the general belief among the Brahmins that their Codes are of Divine origin and infallible. The principle of utility is dimly recognized now and then. But very few ventured to question the infallibility of the Vedas, or to place the rules of law and morality on any other foundation than the sacred scriptures.

The growth of Hindu law never impeded by the belief that it is based on the Vedas and the Sanhitas.

11. Hindu Jurisprudence being based entirely on the Vedas and the Sanhitas, it may seem that Hindu Law is incapable of change. But the fact is, that the Brahminical jurists have changed the law from time to time, though not quite so frequently as the Supreme Legislature of the Indian Government, at the present time. The orthodox belief is, that the Vedas and the Sanhitas are infallible. The Hindu lawyers never openly set up the standard of revolt. But very often it is found that the

respect, which Hindu lawyers practically accord to the authority of the sacred scriptures, is not much greater than that which a powerful minister shows to the authority of the nominal king. A minister like Madhaji Scindia or a Dewan like Clive would take advantage of the name of the nominal master, but would never allow the will of the powerless master to interfere with his own. Generally all the outward marks of allegiance would be shewn, but only so far as is necessary to strengthen the position of the minister. In the same manner, the Hindu lawyers acknowledge, in theory, that the Vedas and the Sanhitas are infallible. But in practice, they never hesitate to get rid of the authority of the sacred Codes somehow or other. Instead of following the authority of the sacred Codes, they would, by the power of logic and grammar, make the sacred Codes follow them. The fact is, that Hindu law has been modified, from time to time, by successive legislators. In effecting such change, they very often take the principle of utility, as their guide, though they never openly acknowledge it as such.

SECTION III.

SOURCES OF HINDU LAW.

THE VEDAS.

The sources of Hindu law

1. The sources of Hindu Law are:

   1. The Vedas.
   2. Sanhitas.
   3. Purans (including Mahabharat).
   4. Commentaries and Digests by human authors not divinely inspired.

Vedas, the primary source in theory.

2. The Vedas are, in theory, the primary source of Hindu law. The Vedas contain effusions of the poetic genius of the ancient Aryans. They were originally handed down, by tradition, as appears from their name Srutri or audition. In the course of ages, the Vedas came to be regarded as of divinely inspired origin. The Rishis, who are mentioned as authors, are held to be only agents in formulating the inspiration. The Vedas are

primarily three in number, *viz.*, the Rik, Sham, and Yaju. At a more recent period, a fourth Veda, the Atharva, was added to them. But the Atharva never attained that sanctity which was allowed to the other Vedas.

The fourfold division of the Vedas.

3. It is not possible to say what led to the classification of the Vedas. It seems probable that the Yaju contained the mantras of religious ceremonies; that the Sham was studied by those who made singing their profession; and that the Rik was studied by those whose function it was to recite the holy poetry. Even at the present time, every Brahmin family has a particular Veda assigned to it. The Brahmins of the country very seldom regularly study the Vedas in these days. Yet ask any Brahmin what his Veda is; and you will have a ready answer. This fact shows that the ancestors of each family were in the habit of reading one or other of the three Vedas. The selection was, in all probability, made according to the family avocation. At a later time, the students of the Rik, Sham, and Yaju, became more exclusive; and their religious rites and ceremonies were regulated by that particular Veda which was the subject of their special study.

The mantras and the Brahmins of the Vedas.

4. Each of the four Vedas consists of two parts—a Sanhita or collection of mantras, and a portion called Brahmana.

The nature of the mantras.

5. A mantra is either a prayer, or else a thanksgiving, or adoration addressed to a deity; it declares the purpose of a pious act, or lauds or invokes the object, it asks a question or returns an answer; either directs enquiries or deliberates; blesses or imprecates, exults or laments, counts or narrates; asks for food or longs to pay homage to the Great Benefactor of the Universe. None, but a believer can enter into the true spirit of these hymns. Millions of men depend upon them for salvation; and repeat them every day, with the firm belief that they will obtain divine mercy by doing so. These mantras are the ultimate source of all the sacred knowledge of the Hindus, and are regarded as the holiest of all holy things.

The Brahmana portion of the Vedas.

6. The mantras are to be found in the Sanhitas of the Vedas. The Brahmins are theological expositions of the Vedas. They are ritualistic treatises which enjoin sacrifices and explain their meaning. The Sanhita of each Veda has a set of Brahmins attached to it. The Rik has *Aitareya* and *Kaushitaki*, or Sankhyana Brahmanas at-

tached to it. There are eight Brahmins relating to the Sama Veda. The Yajur Veda is divided into two schools, and the text books of these schools are respectively called Black and White Yaju. There was a dissension between the teachers of the Yajur Veda, and the sage Yajnyavalkya led the dissenting party. The text book of his school is called White Yaju. The Black Yaju is known as Taittirya Sanhita, and the White Yaju is called Vajasaneya Sanhita. The Taittirya Brahman is attached to the former, and Satapatha Brahmana to the latter.

The several Sakhas of the Vedas.

7. The art of writing being unknown or very seldom resorted to, in ancient times, the great teachers of the Vedas adopted different readings. Partly, on that account, and partly on account of differences of interpretation, each of the Vedas branched off into various Sakhas, or what may be called editions. It is said that the Rik has five, Yaju eighty-six, Sama one thousand, and the Atharva nine such schools.

The study of the Vedas superseded in many parts of the country by the study of the Shmritis.

8. The systematic study of the Vedas has become very nearly obsolete in Bengal and Mithila. The pandits of later times found it absolutly necessary to suppress the Vedas and to bring into prominence, the Shmritis and Digests. The Vedas sanction practices and usages which the mediæval lawyers would not tolerate. They would not discard the authority of the Vedas. So they placed it too high. They said in effect "The Vedas are voluminous, it is impossible for the degenerate moderns to master them. Manu and the other authors of the Sanhitas studied the Vedas in a manner which it is impossible for you to do; you must rest satisfied with the reading of their works; you must not presume to fathom the ocean of the Vedas." The idea that the Vedas are too voluminous for ordinary men, is so firmly impressed on the minds of the pandits of the country, that they very seldom attempt to go through their sacred scriptures. The idea has been productive of a great deal of good. It has rendered social reformation possible; it cleared the way for that gradual development of the law which has actually taken place.

9. Though the systematic study of the Vedas has become obsolete or nearly so, in many parts of the country, yet every Brahmin knows to what Sakha his family belongs. The division of the Brahmin families into Sakhas and Charanas is in all probability due to the same causes,

which now divide them into schools or Sanpradaya. At the present day when a pandit becomes more than usually famous for learning, and propounds new doctrines, or proposes new interpretations, there is generally a bitter feud at first. But if he succeeds in attracting a large number of pupils, then he becomes the founder of a new school. The pupils in their turn become teachers and give currency to the new ideas and interpretations. The family gradually increases. Their descendants would never accept to be taught by one who is not a member of the same literary brotherhood. In the course of time, the bitterness of feeling subsides. But every one knows to what brotherhood, he and his ancestors belong. This is the case now in all the great centres of learning; and it may safely be concluded that similar causes led to the division of the Vedas into so many different branches.

The state of Hindu society as depicted in the Vedas.

10. The state of society, depicted in the Vedas, is well worthy of notice. The poetry of the Rig Veda gives us an insight into the social condition of the Vedic age. "The social condition of the Hindus" says an eminent scholar "as reflected by the hymns of this Veda, is not that of a pastoral or nomadic people, but, on the contrary, betrays an advanced stage of civilization. Frequent allusion is made in them to towns and cities, to mighty kings, and their prodigious wealth. Besides agriculture they mention various useful arts which were practised by the people, as the art of weaving, of melting precious metals, of fabricating cars, golden and iron mail, and golden ornaments. The employment of the needle, and the use of musical instruments, were known to them. They also prove that the Hindus of that period were not only familiar with the ocean, but sometimes must have been engaged in naval expeditions. They had some knowledge of medicine, and must have made some advance in astronomical computation, as mention is made of the adoption of an intercalary month, for the purpose of adjusting the solar and lunar years."

"Nor were they unacquainted with the vices of civilization, for we read in these hymns, of common women, of secret births, of gamblers and thieves.

"There is also a curious hymn, from which it would appear that even the complicated law of inheritance, which is one of the peculiarities of the existing Hindu

law, was, to some extent, already in use at one of the periods of the Rig Veda hymns.

"The institution of caste, however, seems at the time (the Sanhita period) to have been unknown, for there is no evidence to prove that the names which at a later period were current for the distinction of caste, were employed in the same sense by the poets of these hymns."*

THE SHMRITIS.

1. In the Vedic times, society was composed of patriarchical families. Such a state of things was not favourable to the growth of law, properly so called. The disputes which arose between individual members of the family were settled, with a high hand, by the head of the house; and uniformity in the decisions of the Grihapati was never aimed at or expected. It is therefore no matter for wonder that there are no special chapters in the Vedas dealing with law. According to orthodox belief there is a text of Sruti for every proposition of law. But the existence of the text is taken for granted more as an article of faith than as a matter of fact.

The Vedas do not contain any exposition of law properly so called.

2. When the limits of knowledge extended, and when social necessity outgrew the family wants, then the great teachers found it necessary to deal with such matters as law. They would not openly profess to give prominence to anything not contained in the Vedas. The sciences which came into existence in the post-vedic period were therefore dealt with as Vedanga or supplementary to the Vedas. Grammar, prosody, astronomy, law, are all included in the Vedangas.

3. Of the six Vedangas the Kalpa Sutras are one. The Kalpa Sutras are divided into three chapters. The first chapter—called Srauta Sutras—is exclusively devoted to the consideration of the ritual and is founded entirely on texts of the Vedas. The second chapter—called Grihya—treats of domestic ceremonies, *viz.*, those celebrated at birth marriage or death. The third chapter called Dharma Sutras deals with law, properly so called.

Law, properly so called, was formulated in the Kalpa Sutras which were part of the Vedangas or treatises supplementary to the Vedas.

4. The Kalpa Sutras are in the Sutra or aphoristic style which helps the memory; and are probably therefore called Shmritis. The idea, which the authors tried

Sutra style adopted by the early legislators.

* Goldstucker's Literary Remains, Vol. I, p. 271.

to impress upon their pupils, is that the Vedas are too voluminous; and that the Sutras contain, in a concise form, whatever is in the Vedas. As a matter of fact, the Sutra works contained many things that are not dealt with in the Vedas.

The charanas.

5. The authors of the Sutra works became the founders of distinct schools called charanas. Most of the charanas have become extinct. But some exist even to the present day. The bitterness of feeling, which at one time must have existed between the several charanas, has subsided; and the Sutra works of all the charanas are now regarded as equally authoritative by all.

6. Most of the Dharma Sutras are lost. Of the authoritative Shmritis which have come down to our times, the greater number are in the metrical form. But it is now almost conclusively established that the metrical Shmritis are versified redactions of old Dharma Sutras. The Sutra works were in a style which made them exceedingly dry and difficult to understand. The Sutra style was originally adopted in order to give an appearance of truth to the fiction that the Sutra works contained nothing which was not in the Vedas; that the Vedas being too voluminous it was necessary to have a handbook which shall enable the reader to remember the vast mass of matter contained in the original. The fiction being generally accepted as truth, in later times, it was no longer necessary that the Sutra works should remain in their original form. This conclusion is established by the researches of European scholars. The native pandits have never directed their attention to the history of their jurisprudence. Their belief is that all the Sanhitas are equally authoritative; and they cannot be expected to weaken that belief by historical or antiquarian research.

Practically the Shmritis are the primary basis of Hindu Law.

7. Though the Vedas are held to be the ultimate source of law, yet for practical purposes the Dharma Sutras and Sanhitas ought to be regarded as the basis of Hindu jurisprudence. The authors of the Shmritis are human beings. But in the opinion of the orthodox, the Rishis knew the Vedas better than any man, in these degenerate days, can. Any how the Shmritis are now quite as authoritative as the Vedas in the estimation of orthodox Hindus.

Number of Shmritis.

8. Modern research has found fragments or complete

copies of upwards of one hundred Shmritis. Quotations from most of these authorities are met with in the commentaries and digests. The Hon'ble Rao Sahib Vishwa Nath Mandalik has shown that in the Nirnaya Sindhu alone, Kamalakara refers to 131 Shmritis.

The names of the following Rishis are enumerated in Yajnayavalkya Sanhita as authors of Shmriti works.

Names of Shmritis as given by Yajnayavalkya.

1, Manu. 2, Atri. 3, Vishnu. 4, Harita. 5, Yajnayavalkya. 5, Usana. 7, Angira. 8, Yama. 9, Apastamhas 10 Samvarta. 11, Katyana. 12, Vrihaspati. 13, Parasara. 14, Vyasa. 15, Sankha Likhita. 16, Daksha. 17, Gautama. 18, Satatapa. 19, Vasistha.

Parasara's list.

9. Parasara omits the names of Yama, Vrihaspati and Vyasa from the above list; and adds the names of Kasyapa, Gargya, and Pracheta.

Padma Puran's list.

10. The Padma Purana, leaving out the name of Atri in Yajnyavalkya's list, adds the following:

20, Marichi. 21, Pulastya. 22, Pracheta. 23, Bhrigu. 24, Narada. 25, Kasyapa. 26, Visvamitra. 27, Devala. 28, Rishyasringa. 29, Gargya. 30, Baudhyana. 31, Paithinasi. 32, Jabuli. 33, Sumanta. 34, Paraksara. 35, Laugakshi. 36, Kuthumi.

The Code of Manu, the most important of the Shmritis.

11. The most important of the Shmritis is the Code of Manu. The sage Vrihaspati says:—"Manu holds the first rank among legislators, because he has expressed in his Code, the whole sense of the Vedas; that no Code is approved which contradicts Manu." The Code of Manu is not only the most important of all the legal Codes, but it is regarded as almost equal in holiness to the Vedas. Every Brahmin is enjoined to read it, at least once in his lifetime. A Brahmin family, in which Manu has not been read for seven generations, ceases to be Brahmins. In practice the pandits of the country perform the regular *paryan* or recitation of Manu, after having finished their scholastic career, and before setting up as teachers.

Mythical account of the authorship of the Code.

12. The personality of the author of the Code, as described in the work itself, is upon its face mythical. The sages implore Manu to inform them of the sacred laws, and he, after relating his birth from Brahma, and giving an account of the creation of the world, states that he received the Code from Brahma, and communicated it to ten sages, and requests Bhrigu to repeat the same. The rest of the work is then admittedly recited, not by Manu, but by Bhrigu one of the ten.

primarily three in number, *viz.*, the Rik, Sham, and Yaju. At a more recent period, a fourth Veda, the Atharva, was added to them. But the Atharva never attained that sanctity which was allowed to the other Vedas.

The four-fold division of the Vedas

3. It is not possible to say what led to the classification of the Vedas. It seems probable that the Yaju contained the mantras of religious ceremonies; that the Sham was studied by those who made singing their profession; and that the Rik was studied by those whose function it was to recite the holy poetry. Even at the present time, every Brahmin family has a particular Veda assigned to it. The Brahmins of the country very seldom regularly study the Vedas in these days. Yet ask any Brahmin what his Veda is; and you will have a ready answer. This fact shows that the ancestors of each family were in the habit of reading one or other of the three Vedas. The selection was, in all probability, made according to the family avocation. At a later time, the students of the Rik, Sham, and Yaju, became more exclusive; and their religious rites and ceremonies were regulated by that particular Veda which was the subject of their special study.

The mantras and the Brahmins of the Vedas.

4. Each of the four Vedas consists of two parts—a Sanhita or collection of mantras, and a portion called Brahmana.

The nature of the mantras.

5. A mantra is either a prayer, or else a thanksgiving, or adoration addressed to a deity; it declares the purpose of a pious act, or lauds or invokes the object, it asks a question or returns an answer; either directs enquiries or deliberates; blesses or imprecates, exults or laments, counts or narrates; asks for food or longs to pay homage to the Great Benefactor of the Universe. None, but a believer can enter into the true spirit of these hymns. Millions of men depend upon them for salvation; and repeat them every day, with the firm belief that they will obtain divine mercy by doing so. These mantras are the ultimate source of all the sacred knowledge of the Hindus, and are regarded as the holiest of all holy things.

The Brahmana portion of the Vedas.

6. The mantras are to be found in the Sanhitas of the Vedas. The Brahmins are theological expositions of the Vedas. They are ritualistic treatises which enjoin sacrifices and explain their meaning. The Sanhita of each Veda has a set of Brahmins attached to it. The Rik has *Aitareya* and *Kaushitaki*, or Sankhyana Brahmanas at-

tached to it. There are eight Brahmins relating to the Sama Veda. The Yajur Veda is divided into two schools, and the text books of these schools are respectively called Black and White Yaju. There was a dissension between the teachers of the Yajur Veda, and the sage Yajnyavalkya led the dissenting party. The text book of his school is called White Yaju. The Black Yaju is known as Taittirya Sanhita, and the White Yaju is called Vajasaneya Sanhita. The Taittirya Brahman is attached to the former, and Satapatha Brahmana to the latter.

The several Sakhas of the Vedas.

7. The art of writing being unknown or very seldom resorted to, in ancient times, the great teachers of the Vedas adopted different readings. Partly, on that account, and partly on account of differences of interpretation, each of the Vedas branched off into various Sakhas, or what may be called editions. It is said that the Rik has five, Yaju eighty-six, Sama one thousand, and the Atharva nine such schools.

The study ...e Vedas ...rseded ...any parts ...he country by the study of the Shmritis.

8. The systematic study of the Vedas has become very nearly obsolete in Bengal and Mithila. The pandits of later times found it absolutly necessary to suppress the Vedas and to bring into prominence, the Shmritis and Digests. The Vedas sanction practices and usages which the mediæval lawyers would not tolerate. They would not discard the authority of the Vedas. So they placed it too high. They said in effect "The Vedas are voluminous, it is impossible for the degenerate moderns to master them. Manu and the other authors of the Sanhitas studied the Vedas in a manner which it is impossible for you to do; you must rest satisfied with the reading of their works; you must not presume to fathom the ocean of the Vedas." The idea that the Vedas are too voluminous for ordinary men, is so firmly impressed on the minds of the pandits of the country, that they very seldom attempt to go through their sacred scriptures. The idea has been productive of a great deal of good. It has rendered social reformation possible; it cleared the way for that gradual development of the law which has actually taken place.

9. Though the systematic study of the Vedas has become obsolete or nearly so, in many parts of the country, yet every Brahmin knows to what Sakha his family belongs. The division of the Brahmin families into Sakhas and Charanas is in all probability due to the same causes,

which now divide them into schools or Sanpradaya. At the present day when a pandit becomes more than usually famous for learning, and propounds new doctrines, or proposes new interpretations, there is generally a bitter feud at first. But if he succeeds in attracting a large number of pupils, then he becomes the founder of a new school. The pupils in their turn become teachers and give currency to the new ideas and interpretations. The family gradually increases. Their descendants would never accept to be taught by one who is not a member of the same literary brotherhood. In the course of time, the bitterness of feeling subsides. But every one knows to what brotherhood, he and his ancestors belong. This is the case now in all the great centres of learning; and it may safely be concluded that similar causes led to the division of the Vedas into so many different branches

The state of Hindu society as depicted in the Vedas.

10. The state of society, depicted in the Vedas, is well worthy of notice.* The poetry of the Rig Veda gives us an insight into the social condition of the Vedic age. "The social condition of the Hindus" says an eminent scholar "as reflected by the hymns of this Veda, is not that of a pastoral or nomadic people, but, on the contrary, betrays an advanced stage of civilization. Frequent allusion is made in them to towns and cities, to mighty kings, and their prodigious wealth. Besides agriculture they mention various useful arts which were practised by the people, as the art of weaving, of melting precious metals, of fabricating cars, golden and iron mail, and golden ornaments. The employment of the needle, and the use of musical instruments, were known to them. They also prove that the Hindus of that period were not only familiar with the ocean, but sometimes must have been engaged in naval expeditions. They had some knowledge of medicine, and must have made some advance in astronomical computation, as mention is made of the adoption of an intercalary month, for the purpose of adjusting the solar and lunar years."

"Nor were they unacquainted with the vices of civilization, for we read in these hymns, of common women, of secret births, of gamblers and thieves.

"There is also a curious hymn, from which it would appear that even the complicated law of inheritance, which is one of the peculiarities of the existing Hindu

law, was, to some extent, already in use at one of the periods of the Rig Veda hymns.

"*The institution of caste, however, seems at the time (the Sanhita period) to have been unknown, for there is no evidence to prove that the names which at a later period were current for the distinction of caste, were employed in the same sense by the poets of these hymns.*"*

THE SHMRITIS.

1. In the Vedic times, society was composed of patriarchical families. Such a state of things was not favourable to the growth of law, properly so called. The disputes which arose between individual members of the family were settled, with a high hand, by the head of the house; and uniformity in the decisions of the Grihapati was never aimed at or expected. It is therefore no matter for wonder that there are no special chapters in the Vedas dealing with law. According to orthodox belief there is a text of Sruti for every proposition of law. But the existence of the text is taken for granted more as an article of faith than as a matter of fact.

The Vedas do not contain any exposition of law properly so called.

2 When the limits of knowledge extended, and when social necessity outgrew the family wants, then the great teachers found it necessary to deal with such matters as law. They would not openly profess to give prominence to anything not contained in the Vedas. The sciences which came into existence in the post-vedic period were therefore dealt with as Vedanga or supplementary to the Vedas. Grammar, prosody, astronomy, law, are all included in the Vedangas.

3. Of the six Vedangas the Kalpa Sutras are one. The Kalpa Sutras are divided into three chapters. The first chapter—called Srauta Sutras—is exclusively devoted to the consideration of the ritual and is founded entirely on texts of the Vedas. The second chapter—called Grihya—treats of domestic ceremonies, *viz.*, those celebrated at birth marriage or death. The third chapter called Dharma Sutras deals with law, properly so called.

Law, properly so called, was formulated in the Kalpa Sutras which were part of the Vedangas or treatises supplementary to the Vedas.

4. The Kalpa Sutras are in the Sutra or aphoristic style which helps the memory; and are probably therefore called Shmritis. The idea, which the authors tried

Sutra style adopted by the early legislators.

* Goldstucker's Literary Remains, Vol. I, p 271.

to impress upon their pupils, is that the Vedas are too voluminous; and that the Sutras contain, in a concise form, whatever is in the Vedas. As a matter of fact, the Sutra works contained many things that are not dealt with in the Vedas.

The charanas.

5. The authors of the Sutra works became the founders of distinct schools called charanas. Most of the charanas have become extinct. But some exist even to the present day. The bitterness of feeling, which at one time must have existed between the several charanas, has subsided; and the Sutra works of all the charanas are now regarded as equally authoritative by all.

6. Most of the Dharma Sutras are lost. Of the authoritative Shmritis which have come down to our times, the greater number are in the metrical form. But it is now almost conclusively established that the metrical Shmritis are versified redactions of old Dharma Sutras. The Sutra works were in a style which made them exceedingly dry and difficult to understand. The Sutra style was originally adopted in order to give an appearance of truth to the fiction that the Sutra works contained nothing which was not in the Vedas; that the Vedas being too voluminous it was necessary to have a handbook which shall enable the reader to remember the vast mass of matter contained in the original. The fiction being generally accepted as truth, in later times, it was no longer necessary that the Sutra works should remain in their original form. This conclusion is established by the researches of European scholars. The native pandits have never directed their attention to the history of their jurisprudence. Their belief is that all the Sanhitas are equally authoritative; and they cannot be expected to weaken that belief by historical or antiquarian research.

Practically the Shmritis are the primary basis of Hindu Law.

7. Though the Vedas are held to be the ultimate source of law, yet for practical purposes the Dharma Sutras and Sanhitas ought to be regarded as the basis of Hindu jurisprudence. The authors of the Shmritis are human beings. But in the opinion of the orthodox, the Rishis knew the Vedas better than any man, in these degenerate days, can. Any how the Shmritis are now quite as authoritative as the Vedas in the estimation of orthodox Hindus.

Number of Shmritis.

8. Modern research has found fragments or complete

copies of upwards of one hundred Shmritis. Quotations from most of these authorities are met with in the commentaries and digests. The Hon'ble Rao Sahib Vishwa Nath Mandalik has shown that in the Nirnaya Sindhu alone, Kamalakara refers to 131 Shmritis.

The names of the following Rishis are enumerated in Yajnayavalkya Sanhita as authors of Shmriti works.

Names of Shmritis as given by Yajnayavalkya.

1, Manu. 2, Atri. 3, Vishnu. 4, Harita. 5, Yajnayavalkya. 5, Usana. 7, Angira. 8, Yama. 9, Apastambas 10 Samvarta. 11, Katyana. 12, Vrihaspati. 13, Parasara. 14, Vyasa. 15, Sankha Likhita. 16, Daksha 17, Gautama. 18, Satatapa. 19, Vasistha.

Parasara's list.

9. Parasara omits the names of Yama, Vrihaspati and Vyasa from the above list; and adds the names of Kasyapa, Gargya, and Pracheta

10. The Padma Purana, leaving out the name of Atri in Yajnyavalkya's list, adds the following:

Padma Puran's list.

20, Marichi. 21, Pulastya. 22, Pracheta. 23, Bhrigu. 24, Narada. 25, Kasyapa. 26, Visvamitra. 27, Devala. 28, Rishyasringa 29, Gargya. 30, Baudhyana. 31, Paithinasi 32, Jabuli 33, Sumanta. 34, Paraksara. 35, Laugakshi. 36, Kuthumi.

The Code of Manu, the most important of the Shmritis.

11. The most important of the Shmritis is the Code of Manu. The sage Vrihaspati says :—"Manu holds the first rank among legislators, because he has expressed in his Code, the whole sense of the Vedas; that no Code is approved which contradicts Manu." The Code of Manu is not only the most important of all the legal Codes, but it is regarded as almost equal in holiness to the Vedas. Every Brahmin is enjoined to read it, at least once in his lifetime. A Brahmin family, in which Manu has not been read for seven generations, ceases to be Brahmins. In practice the pandits of the country perform the regular *paryan* or recitation of Manu, after having finished their scholastic career, and before setting up as teachers.

Mythical account of the authorship of the Code.

12. The personality of the author of the Code, as described in the work itself, is upon its face mythical. The sages implore Manu to inform them of the sacred laws, and he, after relating his birth from Brahma, and giving an account of the creation of the world, states that he received the Code from Brahma, and communicated it to ten sages, and requests Bhrigu to repeat the same. The rest of the work is then admittedly recited, not by Manu, but by Bhrigu one of the ten.

The Manava school and its Sutras.

13. Among the charanas or schools, there was one known as the school of the Manavas, who used as their text for teaching, a series of Sutras, entitled the Manava Sutras. The Dharma Sutras of this series are unfortunately lost; but it seems highly probable that they were the basis of the existing Code.

The successive redactions.

14 There is a tradition that Manu has undergone three successive redactions. The introduction to Narada states that the work of Manu originally consisted of 1000 chapters and 100,000 slokas, Narada abridged it to 12,000 slokas, and Sumati again reduced it to 4000. The treatise which we possess must be a third abridgement, as it only extends to 2,685.

Vriddha Manu and Vrihat Manu

15. In the legal commentaries two other Manus are frequently quoted—a *Vridha* (old) Manu and *Brihut* (larger) Manu. The verses quoted from these Manus are not to be met with in our Code. The fact is, that there must have been a Manu whose treatise on law was originally written in aphorisms.

Yajnayavalkya.

16. Next in importance to Manu's Code is that of Yajnyavalkya. The latter has formed the basis of several commentaries, *viz.*, those of Bishwarupa, Vijyaneshwar, Sulpani, Devabodha and Aparaditya. The commentary of Bishwarupa is lost. But that of Vijyaneshwar is of paramount authority, in legal matters, throughout India with the exception of Bengal.

Narada.

17. Of the other metrical Shmritis which are obtainable, in the entire estate, that of Narada is the most important, in a legal point of view. The work of Narada is expressly a law treatise, and the sage expends all his ingenuity and skill upon the systematic arrangement of all matters relating to the administration of law. Dogmatic theology and metaphysical paradaoxes do not find a place in his treatise on law.

18. The Narada Shmriti has been translated by Prof. Jolly of the Wurzburgh University.

The age in which the Shmritis were composed.

19. The age of the composition of the Shmritis cannot be determined with anything like precision. But their relative ages can be ascertained. There is very strong reason to suppose that the metrical Shmritis, like those of Manu, Yajnyavalkya and Narada, came into existence after the aphoristic Shmritis. It is true that Gautama, Baudhyana and Vasistha mention Manu by name. But the

texts they quote are not to be found in our Code of Manu. Nay more, our Code of Manu enjoins precepts directly contrary to those quoted by Baudhyana. Vasistha also quotes Manu as an authority on law. Two of these quotations are found in our Institutes; but one of the verses quoted occurs in a metre which is never employed in our Code. These facts show that the existing metrical Code is not the one referred to in the Sutra works of Gautama, Baudhyana or Vasistha.

20. The relative ages of the following aphoristic Shmritis were, in all probability, in the order in which they are mentioned below:

The aphoristic Shmritis Their relative ages.

1. Gautama (quoted by Baudhyana and Vasistha).
2. Baudhyana
3. Harita (quoted by Apastambha and Vasistha).
4. Apastambha (controverts the doctrines of Gautama and Baudhyana).
5. Yama (quoted by Vasistha).
6. Vasistha.
7. Sankha.
8. Parasara.

The age of the metrical Shmritis.

21. It has been already stated that the metrical Shmritis came into existence, in all probability, at a later date. Various ages have been assigned to Manu by European scholars. But the fact is, that the Code has undergone so many redactions, and there are evidently so many interpolated passages in it, that it is simply impossible to determine the date of the original Manu. There can, however, be little doubt that the Code of Manu which we have now, is one of the oldest of metrical Shmritis. If method, classification, and generalization be accepted as indubitable tests of scientific progress, the Code of Yajnyavalkya shows a greater degree of advancement than that of Manu; that of Narada is superior to both in method and arrangement. "The style of Manu," says Sir William Jones, "has an austere majesty that extorts respectful awe." But Manu's work deals with the various matters all mixed up together. Theological and metaphysical speculations are mixed up with moral precepts and legal maxims. Directions as to diet are given side by side with the rules concerning Royal prerogatives, and the law relating to gambling is discussed with the rules of inheri-

The Code of Manu is the oldest of metrical Shmritis

tance. Manu enumerates 18 titles of law; but he does not, in their treatment, strictly confine himself to the order he has himself prescribed.

Yajnyavalkya more systematic.

22. Yajnyavalkya's Code is more systematic. It is evidently based upon Manu, of which it appears to be only a paraphrase in several places. The signs of advancement are unmistakeable.

23. With regard to the Code of Yajnyavalkya, Dr. Weber says "its posteriority to Manu follows plainly enough, not only from the methodical distribution of its contents, but also from the circumstance that it teaches the worship of Ganesh and the planets, the execution upon metal plates of deeds relating to grants of land, and the organization of monasteries, subjects which do not occur in Manu; while polemical references to Buddhists, which in Manu are at least doubtful, are here unmistakable. In the subjects, too, which are common to both, we note in Yajnyavalkya an advance towards greater precision and stringency, and in individual instances, where the two present a substantial divergence, Yajnyavalkya's standpoint is distinctly the later one.*

The age of Narada.

24. Narada's work is certainly of a later date than that of Yajnyavalkya. From the fact that Buddhism is nowhere mentioned in Narada, Prof. Jolly comes to the conclusion that it must have been composed or brought into its present shape at a time when the faith of Buddha had not merely begun to succumb to the victorious assaults of the Brahmins, but when it had been completely replaced by the old Brahminical system. Supposing there is anything in the *argumentum a silentio*, it would follow that the sage Narada lived in the 9th or 10th century A. C. But there can be no doubt that Narada's work had become authoritative long before the age of commentaries and digests; and it is not at all probable that Narada lived about the same time as Medhatithi, Bhoja Deva, Bishwarupa, or Vijyaneshwar.

25. There is a commentary on Narada by Asahaya. Now Asahaya is, in all probability, the title by which Medhatithi is known. If that be the case, then Narada had become authoritative at the time of Medhatithi, *i. e.*, before the 9th century. The word Dinar occurs in the

---

* Weber's History of Sanskrit Literature, p. 281.

Narada Shmriti commented by Asahaya; and as the coins called Dinar came into use in India in the 1st century B. C. under the Indo-Scythian kings, the remote limit of the age of Narada cannot be earlier than that time.

26. The works of Devala, Vrihaspati, Katyana and Vyasa are lost and what we possess of these works are only metrical fragments. Devala appears to be the oldest of the group. Vrihaspati probably followed Devala. Katyana frequently quotes Vrihaspati. Vyasa is apparently the last of the group.

27. A critical history of the Shmritis is likely to throw a flood of light on some of the most difficult points of Hindu law. But, as already stated, the native scholars have not only never directed their attention to the subject, but have, in many cases, done their best to remove the materials from the reach of the student. A great deal has been done, in the field of antiquarian research, by European scholars. But they labour under great difficulties. The traditions, habits, and ideas which are familiar to the natives are altogether unknown to the European scholar. To go through the old manuscripts is generally exceedingly difficult for them. It is true that they have done much in spite of these difficulties. But it is not likely that any material progress will be made, until the great pundits of the country are induced to come to the field and to complete the work taken in hand by European scholars.

COMMENTARIES AND DIGESTS.

All the Shmritis accepted as authoritative

1. The revolution by which Buddhism was rooted out of the country, and the Brahmins regained their ascendancy, enabled them to see in a clear light the danger of a divided house. The several charanas coalesced. They saw that union is strength; they ceased to quarrel; they came to regard the text-books of all the charanas as equally authoritative. Then the question arose how are conflicting dogmas to be reconciled? The minds of the leaders of society were prepared to accept that the apparent discrepancies between the several Shmritis may be explained away. Such being the state of things, commentators came to the field to undertake the task. The ingenuity of the learned found a new channel. Instead of founding new schools, they saw the advantage of reconciling the authorities of the schools already in existence.

The necessity of reconciling the conflicting doctrines.

2. The commentary on Manu by Medhatithi is the earliest of the class of works under consideration. All that is known about the life and history of Medhatithi is, that he was the son of Bhatta Biraswamy. Portions of his great work were lost, and were recast and rehabilitated at the Court of Madana Pala, a prince of the Jat race, who reigned at Kastha Nagara, on the banks of the Jamuna, at the end of the twelfth century. Medhatithi quotes Kumarila, the predecessor of Sankara, who lived probably in the seventh and eighth century of the Christian era. The author of the Mitakshara, who lived in the eleventh century, quotes from Medhatithi, with that respect which is shown only to ancient authors. In all probability, Medhatithi lived about the ninth century.

Medhatithi.

3. The use of Medhatithi's commentary has been superseded by that of Kulluka. But the old commentator is still regarded as one of the greatest authorities on law.

4. The next great authority was Srikara. His work is lost. But Vijyaneshwar, Jimuta, and all the other authorities have cited his opinions, and have taken great trouble to refute them. This shows that Srikara's opinions were at one time held in high esteem.

Srikara.

5. The work of Dhareshwar attained great celebrity at one time. But it is lost like that of Srikara. Dhareshwar's work was composed a little before that of Vijyaneshwar, who cites his opinions and refutes them.

Dhareshwar

6. Vishwarupa was the first to comment on the Code of Yajnyavalkya. His work is also lost. Vijyaneshwar was apparently the pupil of Viswarupa. In the introduction to his work, Vijyaneshwar, referring to the commentary of his teacher, says: "The Code of Yajnyavalkya which has been explained by Vishwarupa in language hard and diffused, is now abridged by me in such a simple and concise style that it may be comprehended even by children." Jimutavahana cites Viswarupa in a few instances in order to support his views.*

Viswarupa.

7. An author named Bharuchi is in one place cited in the Mitakshara. But nothing is known of his work.

Bharuchi

8. The most important of the class of works under notice is the Mitakshara, which is a commentary on Yaj-

* Dayabhaga, Chapter IV, Sec III, para. 5, Chapter XI, Sec. V, para. 12; Chapter XI, Sec. II, para. 29.

nyavalkya, by Vijnyaneshwar Jogi. Its authority is paramount in all the schools except that of Bengal. Even in Bengal, it is received as of high authority, yielding only to the Dayabhaga in those points where they differ.

Mitakshara.

9. The great commentator thus speaks of himself in his celebrated work :—

"I am the son of Padmanabha Bhatta of the stock of Bharadwaja. I am a religious mendicant, and giving up all interest in worldly pursuits, I have entirely devoted myself to the worship of the Supreme Spirit. I am the disciple of one (Viswarupa) who well deserves the title of Uttama or excellent. This commentary on Yajnavalkya's code is my work. No other learned author attempted, before Viswarupa, to explain the texts of Yajnavalkya. I have tried to explain the meaning of my author in simple and concise language; and my commentary, it is hoped, will afford matter for reflection to the thoughtful."

The author's account of himself.

"There neither is, nor has been, nor will be a city like *Kalyana* on the surface of the earth, and in no quarter of the globe has a sovereign been seen or heard of, as powerful as *Bikrama* who is lord over this city. Pandit Vijnaneshwar will not lose by comparison with other learned pundits. May these three (Vijnaneshwar, his sovereign and his native city) who are like the *Kalpalatika* (capable of giving anything that may be asked) live through the countless ages of eternity."*

10. It appears from this, that Vijnaneshwar was a native of Kalyana, and flourished during the reign of Vikramarka. Now Kalyana was the capital of the Chalukya kings in the Deccan. The city still exists under the same name, about one hundred miles to the west and a little to the north of Hydrabad. The city is of ancient origin, but the Chalukyas made its name famous in mediæval India. We find it mentioned in stories and in songs. The kings of Kalyana took a pride in embellishing it with lofty palaces and splendid reservoirs of water. The ruins of the palaces still attest their former magnificence, and the enormous tanks and other works of the Kalyana princes still excite the admiration of travellers.

11. Several kings of the name of Vikrama reigned in Kalyana. The last king of the name reigned from the

* Mitakshara III. Conclusion.

year 1076 to the year 1127. The Chalukya raj was at the zenith of its power in his time. The large number of inscriptions and ruins which refer to his reign, have thrown a flood of light upon the history of this prince. We learn from them that in 1081 A. C. he overcame "Balavaraja of the Pala race," and in 1088 he "crossed the Narmada river, and conquered Kanama and others." Bilhana the poet laureate of Vikrama has filled 18 cantos of his work with a description of the achievements of Vikrama.

12. The father of Vikrama, according to Bilhana's account, subjugated Dhara, the capital of Raja Bhoja. As Vijyaneshwar quotes from the work of Dhareshwar, there can be no doubt that king Vikrama, who was his patron and master, was the last king of that name of the Chalukya dynasty. It therefore follows that Vijyaneshwar lived at the end of the eleventh century.

13. Vijyaneshwar's views and opinions are eminently practical. The high authority in which his work is held, almost throughout India, is due partly to that reason and partly also to the fact that he was the councillor of the most powerful Hindu king in his time.

Apararka.

14. The work of Apararka also is, in form, a commentary on Yajnyavalkya Shmriti. Apararka or Aparaditya Deo belonged to the Konkana branch of the princely house of the Silaras, who had their seat at Thana. He reigned and wrote between 1140—1186 A. C., shortly after Vijyaneshwar's times. His doctrines closely resemble those of his illustrious predecessor; several passages of his work look like amplifications of Vijnaneshwar's dicta, and are of great value for the correct interpretation of the Mitakshara. Two land-grants have been found, which purport to be from Srimat Aparaditya Deo, the lord of Konkana. Both of these grants are dated 1181 A. C. There can be no doubt that the donor of the grants is the author of the work under notice. The time at which the work itself was composed is thus known.

Parasar Madhavya.

15. The commentary on the Parasara Shmriti by Madhavacharya, the Forest of Learning, is in high esteem in Benares, and in the Southern and Western schools. Madhava thus gives a glimpse of his personal history in the Introduction to his commentary:—

"As Angira was of Indra, Sumati of Nala, and Medha-

tithi of Sochya, so Madhava is the spiritual guide and the political minister of king Bukka. Sukiriti is the name of his mother, and Mayana of his father. The learned Sayana and Bhoga Natha are his brothers. His family is descended from the stock of Bhardwaj, follows one of the Sakhas of Yajur Veda, and has adopted the Sutras of Baudhayna."

Madhava's account of himself.

16. Madhava then was the prime minister of Bukka, the third king of Vijaynagara, whose reign commenced about 1361. We learn the genealogy of king Bukka from an inscription containing a land-grant by his grandfather dated 1395 A. C.

"King Sangama had five sons, Harihara, Kampa, Bukkaraja, who was sovereign of the earth, Morapa and Mudgapa."

"Among these five graceful princes, the most celebrated was Bukka, sovereign of the earth, conspicuous for valour as Arjuna among the Pandavas."

"By that victorious king was Vidyanagari (another name for Vijayanagara) made a permanent metropolis; a fortunate city, which is adapted to promote universal conquest."

17. The names of Harihara, Bukka, and Kampa, as well as that of their father, occur in the writing of Madhava and Sayana. As regards the identification of Madhava, therefore, and of his patrons, there is not the shadow of a doubt. The city of Vijayanagara is now in ruins. The Raja of Anagundi, a feudatory of the Nizam traces his descent from the ancient Rajas of Vijaynagar.

18. The birthplace of Madhava is said to have been Pampa, a village situated on the banks of the river Tungubhadra. All the accounts of his life agree as to his having been the prime-minister of Sangama, and of his sons Harihar and Bukka. Madhava died at the ripe age of 90. The date of his birth coincides with the beginning of the fourteenth century. Madhava's name is famous both as a political minister and as a scholar. It was he who made the Hindu kingdom of Vijayanagara powerful enough to be more than a rival to the Muhammadan Sultans of the Deccan for a long time. The names of Madhava and of his brother Sayana are famous for their numerous and important works relating to the Vedic, philosophical, legal, and grammatical works.

Shmriti Chandrika.

19. The authority of the Shmriti Chandrika is very high in Southern India. The author gives no account of himself in his work. He merely tells us that his name was Deva or Devananda Bhatta, and that his father's name was Kesavaditya. It is conjectured that he was a native of Southern India. He quotes from Dhareshwar, Vishwarupa, Vijnaneshwara and Apararka, but not from any later author. As Madhava quotes from Shmriti Chandrika, there can be no doubt that Devananda flourished in the beginning of the 14th century. The *Dattaka Chandrika* is commonly ascribed to Devananda. But there is ample evidence in support of the tradition that Pundit Raghumani of Nadiya was the author of the work.

Subodhini

20. The commentary on the Mitakshara, entitled Subodhini, was written by Bishweshwar Bhatta who lived in the earlier part of the 13th century. Bisheshwar is also the author of the work called Madan Parijata, which is referred to as authoritative by later authors The Madana Parijata and the Madan Binoda were written by the command of Madan Pala, king of Kastha on the banks of the Jamuna. The Madan Parijata does not contain any date. But the author of the Madana Vinoda distinctly says that his work was finished in Sunbut 1231, corresponding to 1175 A. C. There can therefore be no doubt as to the time in which Bishweshwar, the author of the Parijata, lived.

Madana Parijata and Madana Vinoda.

Kalpataru.

21. The Kalpataru by Laksmidhar is a work of authority. Dr. Rajendralala Mittra is of opinion that it was written under the auspices of king Govinda Chandra Deva of Kanauj, who flourished in the beginning of the 12th century. According to Mr. Colebrooke, Lakshmidhara composed his work "by command of Govind Chandra a king of Kasi." By command of the same prince Nrisinha composed a law tract entitled *Govindarnava.* Nrisinha quotes from Madhavacharya, who lived in the 14th century. If Colebrooke's account be the true one, then Lakshmidhara must have lived in the early part of the 14th century. He could not have lived later, as he is quoted by Chandeshwar in the Vivada Ratnakar, which was certainly written in the beginning of the 14th century.

22. The Vivada Ratnakara is a work of very high authority. Chandeshwar, the author of the work, was the minister of Hara Sinha Deva, king of Mithila. Chan-

deshwar says in his work that "he was a minister of the conqueror of Nepal; that in the year 1236 Saka he performed seven times, on the banks of the Vagvati, the ceremony of balancing against gold and silver."

Ratnakara.

23. The work entitled Vivada Chandra was written by Laksmi Devi, the wife of Chandra Sing, the grandson of Rajah Hara Sing. The Vivada Chandra is reckoned as a work of authority in the Mithila school.

Vivada Chandra.

24. The work of highest authority in the Mithila school is the Chintamony by Vachaspati Misra. Vachaspati lived in the time of Hari Narayana, a great-grandson of Hara Sing Dev. As Vachaspati is quoted by Raghnundun, the former must have flourished in the beginning of the 15th century.

Vivada Chintamony.

25. Colebrooke, writing in 1796, said that no more than ten or twelve generations had passed since Vachaspati flourished at Simoul in Tirhut.

26. The Dayabhaga of Jimutavahana is the highest authority on law in Bengal. It is remarkable for its originality and display of legal acumen. While the other commentators and text writers worked in the beaten track, Jimutavahana chalked out a new path altogether. In all the most important points, the conclusions arrived at by him, are essentially different from those of his predecessors. What is most remarkable, is that although he has controverted the established doctrines throughout, there is scarcely a single inconsi tency in his work. Sometimes the texts are hopelessly conflicting. But even in such cases, Jimuta has reconciled them in a manner which is truly astonishing The style of the work is compact; the sequence of ideas thoroughly logical. Upon the whole, the book may well serve as a specimen of what a Hindu jurist and legislator can achieve, under a Government that would encourage and utilize such talent.

Dayabhaga.

27. There is a tradition that the Dayabhaga of Jimutavahana stood the test of a trial by fire. This indicates the high estimation in which the work is held by the Pundits of Bengal.

28. Jimuta refers to the opinions of Srikara, Bhojadeva, ishwarupa and Govinda Raja. He never expressly refers the Mitakshara. But his whole work may be said to a refutation of the doctrines of the Mitakshara. Sri- and Vijynaneshwar, these are the two authors, whose

doctrines he has assailed mercilessly. Srikara is expressly named throughout. Vijynaneshwar is nowhere named expressly. But passages of the Mitakshara are quoted in several places for refutation. In some places, Jimutavahana has apparently controverted the doctrines of Vachaspati. (See Daya., Chap. XI, Sec. IV, para. 3.) Had Vachaspati been a later author, he would have taken care to refute the Dayabhaga. It is not unlikely that Vachaspati was a contemporary of Jimuta. In that case Jimuta must have lived in the 15th century.

The probable age of Jimuta.

29. The earliest writer with a known date who quotes from the Dayabhaga of Jimutavahana is Raghunandana. Raghunandana, as will be shown, flourished in the 16th century. Taking all things into consideration, it seems probable that Jimutavahana lived in the 15th century. At that time the pandits of Bengal and Mithila came into closer contact than they do now. The kings of Mithila were the great patrons of learning. There are traditions still in Nadiya to the effect that the great pandits of that place used to go to Mithila, in those times, to finish their studies and to measure their relative strength in learned wrangling. At a later time the current was reversed. Instead of Bengal pandits going to Mithila for finishing their studies, the Mithila pandits still come to Nadiya for the purpose. This reversal of the current took place, according to the traditional account, from the time of Raghunath Siromani, the celebrated author of Chintamony Didhiti, who was a contemporary of Raghunandana.

30. At a later time the court of Rajah Kashinath of Nadiya, who lived in the latter part of the 16th century, afforded a rallying point to the pandits of that place. Still later the ancestors of the present Rajas of Nadiya constituted themselves as patrons of the Nadiya pandits. Anyhow, the intimate connection which at one time existed between the Bengal Pandits and those of Mithila was severed, about the time of the conquest of Bengal by the Moguls and the ruin of Gour, which served as the connecting link between Bengal and Mithila. But there can be no doubt that before that period, they used to come into closer contact than they now do. There was a bitter spirit of rivalry between them. Raghunandana quotes the Mithila authorities in a reverential spirit. But the object of his work was to supersede the Mithila authorities.

The very fact that the Bengal Pandits adopted the work of Raghunandana at once, shows the anxiety which they felt to have an independent school of their own.

Grounds for the supposition that Jimuta was a Bengal pandit.

31. Considering all circumstances, Jimutavahana appears to have been a Bengal Pandit. Had he been of Mithila, he would never have been accepted as an authority in Bengal. The very fact that the Dayabhaga is accepted as the leading authority on law, in Bengal, leads to the conclusion that the author was a Bengal Pandit. In this country, the pandits adopt that book as their text, which is recommended by their teacher. It is not likely that any teacher of Bengal brought to light, for the first time, this most difficult of all Hindu law-books; and not only accepted its views, but did his best to have those views accepted by his pupils. What appears more probable is, that Jimuta was a Bengal Pandit, that he taught in Bengal, that by his teaching he enabled his pupils to see the value of his book; that his book was adopted by the Bengal Pandits, partly on account of its intrinsic merit, and partly on account of the fact that the author was a Bengal Pandit.

32. At the conclusion of his work, Jimuta has declared that he was sprung from the clan called Parivadra. Now it appears that among the Srotriyas of the Rarhya class of Bengal Brahmins, there is a class which in colloquial language is called Pariyal. If the Pariyals be the same as Paribhadra, then there can be no doubt that Jimutavahana was a Bengal Brahman of the Paryal class.

33. There are altogether seven different commentaries on the Dayabhaga of Jimutavahana, *viz.*, by the following authors:

The commentators of the Dayabhaga.

1. Sreenath Acharya Chudramoni, son of Srikaracharya.
2. Ram Bhadra Nyalunkar, son of Sreenath Acharya..
3. Raghunandana.
4. Achyutananda Chuckravarti.
5. Moheshwar.
6. Sree Krishna Tarkalankar.
7. Krishna Kanta Vidyavagish of Nadiya.

Of these commentators, Sreenath is the earliest, and Krishna Kanta is the latest. The commentary of Sree-

kishen is undoubtedly the best. It is used by the Pandits of the country, as a part of their regular course of study. The Courts of law have therefore very properly accepted it as the most authoritative of all.

Raghunandana.

34. Raghunandana is the highest authority in Bengal, in all matters excepting inheritance. With regard to Daya or inheritance, Raghunandana has accepted the views of Jimutavahana. But in all other matters his authority is supreme in Bengal. There are two classes of Pandits in Bengal. One class devote themselves to Nya or dialectics—to the works of Gangesh Upadhya, Raghunath Siromani, Jagadish Tarkalankar and Gadadhar Siromoni. The other class devote themselves to the study of Raghunandana, Jimutavahana, Shulpani and Sreekishen.

35. It appears from a sloka in Raghunandana's Jyotish Tatwa that that part of the work was written in 1421 Saka corresponding to 1499 A. C. There is a tradition in Nadiya that both Raghunandana and Raghunath were contemporaries of Chaitanya. Now, it appears from the life of Chaitanya, by his follower Krishna Das Kaviraj, that he was born in the year 1407 Sakha, corresponding to 1485 A. C. The tradition regarding Chaitanya and Raghunandana being contemporaries is corroborated by the dates obtained from the Jyotish Tatwa and Chaitanya Choritamrita.

Daya Rahasya.

36. The Daya Rahasya or Smriti Ratnavali of Ramanath Vachaspati threatened at one time to supersede Raghunandana and Jimutavahana. This Ramanath is, in all probability, the one whose name is still highly revered by the Pandits of Nadiya. Tradition still points to the spot where he held his tol. It is considered as almost sacred. On that very spot stands a brick-built tol lately constructed through the munificence of an up-country merchant.

37. The very names of Ramanath's works are now forgotten. One of the leading families of Nadiya, namely, the descendants of Arjun Misra, the celebrated commentator of the Mahabharat, adopted the works of Raghunandana and Jimutavahana. The members of this family acquired such a reputation, that all the Shmriti pundits now are their pupils or their pupils' pupils. The result is, that the authority of Raghunandana and Jimutavahana is supreme; and there is no rival in the field now.

38. As Raghunandana is respected in Bengal, so Mitra Misra, the author of the Viramitrodaya, is esteemed in the Benares school. Mitra Misra quotes Raghunandana but not any later author. He must therefore have flourished in the 16th century. Mitra Misra follows the Mitakshara. His chief object was to refute the doctrines of Jimuta, Devananda and Raghunandana.

Viramitrodaya.

39. Nanda Pandita is best known as the author of Dattaka Mimansa. He is also the author of a commentary on Vishnu, entitled Kesava Vaijainti, and also of a commentary on the Mitakshara. In the Vaijainti the author says that he was the son of Ram Pandit of Benares. The work was finished in 1689 under the auspices of Kesava Navaka, son of Maharaj Kandeya Navaka, descended from the Bharadwaja stock." This would give the year 1633 A. C. as the date of the commentary on Vishnu.

Dattaka Mimansa.

40. The founder of the family of Nanda Pandita, according to Mr. Mandlik, was Lakshmidhara, a resident of Behar. He settled in Benares. Nanda Pandit was sixth in descent from him. His descendants are still living in Upper India.

41. Laksmi Devi was the authoress of the commentary on the Mitakshara, known as that of Balam Bhatta. She tells us that her husband's name was Vaidyanath, and she was the mother of Nalakrishna. She cites Nanda Pandit, but not any later author. She must have flourished towards the end of the 17th century.

Balam Bhatta.

42. Kamalakara is the author of Nirnaya Sindhu and Vivada Tandava. Both these works are of very high authority in the Northern, Western and Southern schools. Kamalakara tells us, in the Nirnaya Sindhu, that his work was finished in 1668 Sambat, corresponding to 1612 A. C.

Kamalakara.

43. The Vyavahara Mayukha is of paramount authority in Guzrat and in the island of Bombay. In the Maharastra country, the authority of the Mayukha is considered as inferior only to that of Mitakshara. The Vyavahara Mayukha is the sixth Mayukha or ray of the Bhagavanta Bhaskara, 'the sun' composed (with the permission of, and dedicated to, king Bhagavanta Dev) by Nilkanta Bhatta.

Nilkanta.

44. Kamalakara and Nilkanta were cousins, both being grandsons of Narayana Bhatta. As the date of Kamalakara is known from his work, that of Nilkanta is

also deducible from the same data, both being, in all probability, contemporaries. Descendants of Nilkanta are still living in Puna and Benares.

Sreekishen.

45. The commentary on the Dayabhaga, by Sreekishen, has been already referred to as the best, and at the same time most authoritative. Sreekishen is also the author of the Krama Sangraha, which gives a summary of the law of inheritance propounded in the Dayabhaga.

46. Mr. Colebrooke says, in his preface to his translations of the Dayabhaga and the Mitakshara, that the daughter's son of Sreekishen was alive in 1790. Mr. Colebrooke does not say who this daughter's son was, or where he lived. The information given by Mr. Colebrooke does not, therefore, render it possible to make further enquiry on the basis of that.

47. It is generally believed in Nadiya that Sreekishen originally came from the District of Malda; that he was of the class of Maithila Brahmins who are called Vaidiks in Bengal; that he married in the neighbouring town of Purbusthali, in the family of the celebrated Krori Mukanda Ram Chuckravarti; that he settled in Purvasthali, where the last of his descendants lived until about 20 years ago. As the male members of the family are all dead, it is not possible to verify the tradition. But the relations of the family all agree in saying that Sreekishen Tarkalankar, the author and the commentator, was the founder of the family. The last surviving member of the family used to say that he was sixth in descent from Sreekishen.

48. The commentary of Sreekishen was first brought into use by Ram Gopal Nyalanka, who was the leading Shmarta of Nadiya, at the time of the commencement of British rule. If the account given above, about Sreekishen, be true, then he was in all probability connected with the family of Ram Gopal, and it is not difficult to see why Ram Gopal introduced the practice of studying the commentaries of Sreekishen on Dayabhaga and Sradha Viveka.

Vivadarnava Setu.

49. Since the establishment of British empire in India three digests have been composed in Sanskrit. The first of these is the Vivadarnava Setu, compiled at the request of Mr. Warren Hastings in the year 1773. In the following year a translation of the work was made by Mr. Hal-

hed and published under the title of "A Code of Gentu Laws." This work, however, was disapproved by Sir William Jones for reasons set forth in his letter to the chief Government of India, in which he strongly recommended the enforcement of the Hindu law, and the compilation of a better Code. The result of the proposal, made by Sir William Jones, was the composition of the Vivadasararnava and Vivadabhangarnava the former by Sarvara Trivedi, a lawyer of Mithila, and the latter by Jagannath Tarka Panchanana. The Vivada Bhangarnava was translated by Mr. Colebrooke, and is known as Colebrooke's Digest. This digest treats in full of the topics of contract and inheritance.

Vivada Sararnava. Vivada Bhangarnava.

50. Jagannath's work is generally considered as an authority by English text writers and by our Judges. But the Bengal Pandits have never accepted it as such; and considering the numerous errors which, apparently, abound in the work, it is not likely to be accepted as an authority by the native Pandits, at least, not till some commentator can show that the erroneous opinions are not those of the author. The book may be referred to as a collection of texts. But it cannot be regarded as an authority on Hindu Law.

Jagannath as an authority.

51. Almost all the leading authorities of the several schools have been translated into English. Mr. Colebrooke translated the Dayabhaga and the Mitakshara; Mr. Borradaile translated the Mayukha; Mr. Kristna Swamy Iyer translated the Shmritchandrika; Mr. Wynch translated the Kramasangraha; Mr. Sutherland translated the Dattaka Chandrika and Dattaka Mimansa; Babu Prasanna Coomar Tagore translated the Chintamony; and of late, Pandit Golab Chandra Sastri has translated the Viramitrodaya.

The English translations of Hindu law books.

52. Most of these translations are accurate enough. But the style of the translations is necessarily such, that by reading the translation only it is simply impossible to make out what the author means to say. The discussions in Hindu law books are mainly grammatical, or based on rules of Mimansa, the technicalties of which cannot possibly be translated into English. Then again, several different interpretations are very often proposed of the same text. In an English translation, it is very often impossible to retain the ambiguity of the original. If the ambiguity be not capable of being preserved in the

translation, then the reader of the translation cannot the exact nature of the controversy. Upon the whole, the translations in English are very nearly useless, even where intelligible.

If English lawyers be entrusted to administer Hindu law, as at present, then the Dayabhaga, Mitakshara, and other authoritative works ought to be re-translated in such manner that one unacquainted with Sanskrit may follow the drift of the arguments. Mr. Colebrooke has given some hints in paranthetical clauses. But these throw very little light. There ought to be a regular commentary following each para.

Section IV.

HISTORY OF THE LEGISLATION RELATING TO THE APPLICATION OF HINDU LAW TO HINDUS.

he Shmri- were the itorial of the ntry be- the Ma- nedan quest.

1. Before the introduction of the Mahomedan religion in India, the Hindu law was the law of the land. It provided for all classes who then inhabited the country; and the application of the law was general, except so far as it was limited by want of sufficient power to enforce If a man of the aboriginal tribes submitted to the authority of the Brahmins, as such men apparently used to do very often, there is no reason whatever to suppose that the Brahmins refused to exercise jurisdiction. The independent tribes who lived in mountain fastnesses had, in all probability, their own laws and customs. But in such parts of the country as were subject to the influence of Brahminism, the aboriginal tribes apparently submitted to the authority and legislation of the Brahmins as they do now The Brahmanical Codes of Manu, Jagnyavalkya &c. may therefore be said to have been the territorial law of the country. It is true that the Samhitas and digests differ from one another in many important points. But the basis of the law was the same, namely, the Vedas; and the difference was not much greater than that which exists, at the present day, between the authoritative rulings of the superior Courts of law.

fter the homedan

2. The introduction of the religion of Mahomet and the political ascendancy which the followers of Islam ac-

quired in the country threatened the very existence of the religion and laws of the Hindus at times. But, as a general rule, the Mahomedan rulers, like the Hindus who preceded then, never interfered in the internal affairs of the people. *The Hindus had therefore not only the benefit of their own laws, but the power of administering the same was also in their hands in a great measure* The *Hindu law ceased to be the territorial law of the country* under the Mahomedans. But within the Hindu community, it remained in full force as a personal law At the time of the English conquest, there was therefore no territorial law in the country. The Hindus and the Mahomedans had each their personal law. But territorial law there was none, except perhaps in criminal matters. It may be said, that the Hindu law was the territorial law of the country so far as the Hindus were concerned; and that the Mahomedan law was the territorial so far as the Mahomedans were concerned But in whatever point of view the state of things be looked upon, there can be no doubt that there was not any law which was applicable to all classes in the country. There was in fact no law which could be held as applicable to persons who were neither Mahomedans nor Hindus, and who had no personal law of their own.

conquest the Shmritis became the personal law of the Hindus.

3. The acquisition of sovereign power by the English placed the country, for the first time in its history, under the rule of a foreign Government which had its own laws in the parent country The question has, therefore, been sometimes raised, whether, with the English conquest, the English law was imported into the country. Upon a question of succession to the estate of a Jew in the Mofussil, the late Supreme Court of Calcutta ruled "that the Court is bound to decide the same by English law." The Indian Law Commissioners also held that English law was the territorial law of India irrespective of Acts and Charters. In Freeman *v.* Fairlie, Master Stephen after examining all the Charters from the year 1726 downwards says: "I find in none of them any express introduction of English law, but on the contrary, they seem all to have proceeded on the assumption that the English law was already in force in those settlements."

English law held in some cases to be the territorial law of India under English rule.

4. In the case of Rani Sarnamoye *v.* Advocate General of Bengal, their Lordships of the Privy Council laid

ie contra- uld down

ni Sarna- e v. Ad- te-Gen-

down the opposite view. Lord Kingsdown in delivering judgment, observed, "Where Englishmen established themselves in an uninhabited or barbarous country, they carry with them not only their own laws, but the sovereignty of their own State; and those who live amongst them, and become members of their community, become also partakers of, and subject to the same laws.

"But this was not the nature of the first settlement made in India—it was a settlement made, by a few foreigners, for the purpose of trade, in a very populous and highly civilized country, under the government of a powerful Mahomedan ruler, with whose sovereignty the English Crown never attempted nor pretended to interfere for some centuries afterwards.

"If the settlement had been made in a Christian country of Europe, the settlers would have become subject to the laws of the country in which they settled. It is true that in India they retained their own laws for their own Government within the factories, which they were permitted by the ruling powers of India to establish; but this was not on the ground of general international law, or because the Crown of England or the laws of England had any proper authority in India, but upon the principles explained by Lord Stowell in the case of 'The Indian Chief.'

"The laws and usages of Eastern countries where Christianity does not prevail, are so much at variance with all the principles, feelings, and habits of European Christians, that they have usually been allowed by the indulgence or weakness of the potentates of those countries to retain the use of their own laws. But the permission to use their own laws by European settlers, does not extend those laws to Natives within the same limits, who remain to all intents and purposes subjects of their own Sovereign, and to whom European laws and usages are as little suited as the laws of the Mahomedans and Hindus are suited to Europeans." (9 M. I. A. 426)

5. The fact is that the Mahomedan rulers very seldom interfered in the internal affairs of the country; and the European settlers were allowed to have the benefit of their own laws, just as the Hindus had of their own. So long as the English people settled in the country as traders, the English law could not be the territorial law even

within the limits of their factories. As to the effect of the subsequent acquisition of sovereign power by the English, the following observations fell from Lord Kingsdown in the case referred to above—

"But if the English laws were not applicable to Hindus, on the first settlement of the country, how could the subsequent acquisition of the rights of sovereignty, by the English Crown, make any alteration? It might enable the Crown, by express enactment, to alter the laws of the country, but until so altered, the laws remained unchanged."

The position of the natives of the country under British rule.

6. Nothing could be more mischievous or untrue than the idea that India is a conquered country, or that the people of India are absolutely at the mercy of the conquerors The fact is, that the people were tired of the anarchy which prevailed at the period of the decline and fall of the Mogul Empire; and they not only readily submitted to be ruled by the English, but, in a great many cases, they fought side by side with the English to support their cause In Bengal at least the English owe their power not so much to the force of their arms as to the moral support of the leading men of the country, and to the Dewany sunud given to them by the titular emperor of Delhi. To say that the natives of the country were ever conquered, in the proper sense of the term, or that they ever were or are absolutely at the mercy of the English, is an assertion which is not only unsupported by history, but is shocking to all sense of morality. It is therefore rather surprising that such an assertion has been sometimes made by lawyers and Judges.

7. In this country the Brahmins, who are the leaders of the people, took little or no interest in political affairs. Their ambition was too high. They succeeded in having themselves honoured as gods on earth. Even crowned heads bowed before them. The Brahmins being thus indifferent towards matters of imperial politics, people from foreign countries sometimes established their power without much difficulty. The character of Englishmen who came to this country was unknown to the people; and as they conducted themselves with great tact, in their earlier days, the people generally believed in their professions. They really expected a better government. Various circumstances, such as the invention of the Steam

Engine and the Electric Telegraph subsequently strengthened this belief; and notwithstanding all their grievances, the people are still unwilling to have any change of Government. That is the real secret of the existence of British Government in India. The power of the British Crown depends as much on the will of the people, here, as in any other country. In return, then, for their allegiance the people have a right to be governed by such laws as are suitable to them. To maintain the opposite is not only morally wrong, but would lead to the most disastrous results.

History of the legislation by which the Hindus and Mahomedans have been secured of their own laws.

8. From the time the English became the sovereign power of the country, they wisely resolved that the natives should have the benefit of their own laws, so far as inheritance, marriage, succession and certain other matters are concerned. A plan for administration of justice was drawn up by Mr. Warren Hastings, and was subsequently adopted by the Company's Government in 1772. The 23rd rule of that plan provided that Hindus should be governed by the laws of their Shastras, with regard to inheritance, marriage, caste and other religious usages. The cognizance of all disputes, concerning civil rights, was entrusted to certain provincial Courts which were presided over by Collectors on the part of the Company; who in dealing with Hindus were bound to consult the Brahmins who attended their Courts, for the purpose of supplying them with information upon Hindu law, and to assist them in passing the decrees. These Courts were made subject to the Sudder Dewany Adalut, which sat in the Presidency Town.

9. In the next year (1773) the Regulating Act was passed by the Imperial Parliament in England, which empowered the Governor-General and Council to make *Rules and Regulations* for the Government of Bengal, and thus a Legislative as well as a judicial authority was established in the province. The first Regulation was passed in the year 1780, and related to the administration of justice. The exact words of the 23rd Rule of Warren Hastings' plan were introduced into the 27th section, and then, as far as the Bengal Presidency was concerned, the administration of their own laws was secured to Hindus, in all suits regarding their inheritance, marriage, caste and other religious usages and

institutions. In 1781 the section was re-enacted in the revised Code with the addition of the words "succession."

10. The Regulating Act also empowered the Crown of Great Britain to erect and establish a "Supreme Court of Judicature at Fort William in Bengal" and accordingly in the next year (1774) that Court was established. Thus two distinct judicial establishments came into existence in the country—the Supreme Court established by Royal Charter, the Adalat system by the local Legislature and Government of Bengal.

11. The Act of the Imperial Parliament, and the Roya Charter, by which the Supreme Court of Calcutta was stablished, made no provision as to what law should be applicable to the natives of the country. In consequence of disputes which arose between the Governor-General and the Supreme Court an Act was passed in the year 1781, known as the Declaratory Act, by section 17 of which it was enacted, with regard to the native inhabitants of Calcutta, that "their inheritance and succession to lands, rents and goods and all matters of contract and dealing between party and party, shall be determined in the case of Mahomedans by the laws and usage of Mahomedans, and in the case of Gentoos by the laws and usages of Gentoos, and when one of the parties shall be a Mahomedan or Gentoo, by the laws or usages of the Mahomedan." The same Statute also enacted that regard should be had to the civil and religious usages of the natives, and that the rights and authorities of the fathers and masters of families should be preserved to them respectively within their said families; and that the Court, in framing its process and its rules and orders for execution thereof in suits, civil or criminal, against the Natives of Bengal, Behar, and Orissa, might accommodate the same to the religion and manners of such natives, so far as the same might consist with the due execution of the laws and attainment of justice. From the section of the Declaratory Act, quoted above, it will appear that it made the Hindu law applicable, within the Town of Calcutta, to contracts between Hindus. In this respect the Act of Parliament secured to the Hindus of Calcutta, the benefit of their own laws in matters, in which, according to the Regulations of the Company's Government, the Courts of

law in the Mofussil were left to take equity and good conscience as their guide.

12. In the time of Lord Cornwallis the Regulations were revised; and section 15 of the new Regulation, IV of 1793, re-enacted that in suits regarding succession, inheritance, marriage and caste, and all religious usages and institutions, between Hindus, they should have the benefit of their own laws.

13. Section 15 of Regulation IV of 1793 has been repealed by Act VI of 1871. Section 24 of the latter enactment reproduces the provision of the Regulation which it has repealed. Similar provisions, in the Civil Courts Acts, for the several provinces of India secure to the Hindus the same rights everywhere.

tory of legisla- as re- the dencies adras ombay.

14. The history of the legislation, by which the Hindus are allowed the benefit of their own laws, is the same in the other Presidencies. The Governor of Madras and his Council were empowered by 39 and 40 Geo. III c. 79 to make Regulations for the Provincial Courts and Councils at that Presidency. The Madras Regulation, III of 1802, provided for the administration of Hindu law in the case of Hindus, in the very words of the Bengal Code.

15. The Hindu inhabitants of the towns of Madras and Bombay obtained the benefit of their own laws, for the first time, in the year 1799 under 37 Geo. c. 142, which authorized the creation of Recorders' Courts in those towns. Section 13 of the Act was in terms exactly similar to section 17 of the Declaratory Act.

16. The Recorder's Court at Madras was abolished, and a Supreme Court was constituted there by 40 Geo. III c. 79, sec. 22 of which repeated the words of the Statute which it superseded, as to the administration of native laws.

17. The Recorder's Court at Bombay was continued till 1823, in which year by 4 Geo. IV c. 71 provision was made for the establishment of a Supreme Court at Bombay. Section 29 of the Act repeated again the wording of the previous enactments as to application of native laws.

18. The Supreme Courts established in the several Presidency Towns, are now abolished. But the Acts and Charters, by which the existing High Courts have been constituted, provide for the administration of the same laws as were administered by the Courts which they

ave superseded. The Hindus and Mahomedans in the 'residency Towns, have, therefore, the benefit of their own aws still as to inheritance and succession. In respect of contracts, the application of their laws is now apparently subject to the proviso in section 1 of the Contract Act, so that contracts which are unlawful according to the Statute cannot be enforced, though such contracts be legal according to Hindu or Mahomedan law to which the parties are subject. But what is unlawful according to Hindu law is not rendered valid by anything in the Contract Code (Ram Cannoy Audhicarry *v.* Johur Lal Dutta, I. L R., 5 Cal , 868; Rasik Lal Muduk *v.* Lokenath Korma Kar, Ib., 688).

Construction of sec 17 of the Declaratory Act.

19. By sec. 17 of the Statute 21 Geo. III, c. 70, and by the corresponding sections in the Statutes by which the Supreme Courts at Madras and Bombay were constituted, it is provided that where only one of the parties shall be a Mahomedan or Gentoo, there the case should be decided by the laws and usages of the defendant. On the construction of section 17, it has been held that the words "their inheritance and succession" in the earlier part of the section, relate to inheritance and succession by the defendant in the clause at the end. In the case in which the construction of the section was in question, the widow of an Armenian sued the purchasers of her husband's property for dower. The defendants were Hindoos.

Pontifex, J. observed:—"It seems to me, though the anguage is a little confusing, that the true construction of the section must confine the words 'their inheritance and succession' to questions relating to inheritance and uccession by the defendants. The present is a question of the plaintiff's succession, and therefore not determinable by the laws and usages of the Gentoos." (Sarkies *v.* Prosona Mayee Dossee, I. L. R. 6 Cal., 808.)

Section V.

WHO ARE GOVERNED BY THE HINDU LAW.

1. The Hindu law undoubtedly applies to those who ollow the Brahminical religion, *i. e.*, who believe in the uthority of the Vedas, Sanhitas, Purans and Tantras. But would hardly be right to limit the application of the law

to *bonâ fide* followers of the Brahminical faith. To say nothing of those, and they are not a few, whose observance of Hinduism is mere matter of outward form and social convenience, there are classes of persons, such as the Brahmos, who do not observe even that outward form. Such persons cannot be called Hindus by religion; and yet it would be going too far to hold that they are not Hindus within the meaning, for instance, of sec. 331 of Act X of 1865, and that succession to their property should be regulated by the Indian Succession Act, and not by the Hindu Law. To include such persons within the category of Hindus, the term must be taken to include not only persons who are Hindus by religion, but also the descendants of such persons who are not completely excommunicated from Hindu society, on account of change of religion.

. test sug-
sted.

2. The Hindu law has been held to apply to Buddhists, Jainas, Sikhs (Lala Mohabeer Pershad *v.* Mt. Kundun Koowar, 8 W. R., 116; Bhagvandas Tejmul *v.* Rajmul, 10 Bomb., 258; Sheo Sing Roy *v* Dukho, I. L. R., I. All. 688).

Iindu law
plies to
ddhists,
nas,
chs, &c.

3. Before the passing of the Indian Succession Act, it was held that Native Christian converts from the Hindu religion were at liberty to renounce the Hindu law of Succession or to adhere to it. (Abraham *v.* Abraham, 9 M. I. A., 195). But the Indian Succession Act is now the territorial law of the country; and it applies to all who are not Hindus, Mahomedans, Sikhs, Jains or Buddhists.

4. The provisions of section 4 of the Succession Act are prospective, and leave rights unaffected which had already been acquired before the passing of the Act. (Sarkies *v.* Prosunamoy in I. L. R. 6 Cal., 795).

But not to
tive
ristians
10 have
come con-
rted after
e passing
the Suc-

5. In a case in which it appeared that the plaintiff, who was the son of a native convert, was born before the passing of the Indian Succession Act, the Madras High Court declared that—"If any portion of the property was ancestral as between the plaintiff and his father, and if the family continued to observe the Hindu Law of Succession until the Indian Succession Act altered their rule of succession, the plaintiff may, at his birth, have acquired an interest in such ancestral property, of which the subsequent enactment of the Succession Act would not, in our opinion, deprive him." (Ponnusami Nadun *v.* Dorasami Ayyan, I. L R. 2 Mad. 211.)

SECTION VI.

THE SEVERAL SCHOOLS OF HINDU LAW.

1. The same causes which, in early times, divided the Brahmins into innumerable Shakhas and Charanas, also tended, *in later times, to the division into the several schools of Hindu law which exist even at the present day. But for British conquest,* the number of schools would have either increased or decreased. Just at the present time, there is a tendency among the Pandits of East Bengal to set up the standard of revolt against the authorities of Nadiya. But the imperial Government of the present day has deprived the Brahmins of the legislative power which they possessed and exercised from time immemorial. No Pandit can now hope to be able to set up a new school, however eager he may be to shake off the authority of the old ones. The five schools, into which the Brahmin lawyers were divided at the time of British conquest, exist, at the present time, without increasing or diminishing.

The five schools to which Hindu lawyers were divided at the commencement of British rule.

2. It is difficult to say when all the charanas coalesced, and when all the Shmritis came to be regarded as equally authoritative. There can, however, be no doubt that the heat of the quarrel subsided long before Medhathithi, who lived in the 8th century. Medhatithi is one of the earliest of those commentators who undertook to reconcile the several Shmritis. The labours of Bhoja Raja, Bishwarupa, and Srikara were apparently in the same direction. The reunion being effected, division commenced again. The work of Vijyaneshwar was accepted as authoritative almost throughout India, when it was published. But within a century Devananda Bhatta founded the Dravira school. In another century the Mithila school was founded by Chandeshwar. But the most important revolution was that which was effected in Bengal by Jimutavahana and Raghu Nunduna, the leading authorities of that school. There are still traditions in Nadiya as to the spirit of rivalry which existed, in the 15th century, between the Pandits of Nadiya and those of Mithila. In logic or Nya, the Mithila Pandits at last gave the palm of victory to those of Nadiya; and from that time the Pandits of Mithila come to Nadiya in order to learn the Nya Shastra.

But in law, the two schools never coalesced. The Pandits of Mithila adhered to the text books of Chandeshwara and Vachaspati. But in the Nadiya school, the works of Jimuta and Raghunanda were adopted as text books, and became, from that time, of paramount authority.

3. In Gujerat and Maharashtra, the works of Vijnyaneshwar and Aparaditya Deo were apparently the principal authorities for a long time. But the work of Nilkanta acquired great authority in the 17th century; and the Western schools were founded before the last century.

4. From what has been said above, it will appear that the five schools, into which Hindu lawyers are now divided, came into existence before the last century.

5. There are minor sub-divisions in each school. But as the text books are the same in each school, the differences of opinion, between the several branches of the same school, are not of much importance.

6. The several schools differ mainly in using some particular work as text book, and in citing the same as of unquestionable authority on all disputed questions. If the particular text book used in any school is silent on any point, the lawyers of that school would refer to other works for a rule on the point. They would also support their own opinion by quotations from the text books of another school. But where there is a clear difference of opinion between the leading authorities of the several schools, the lawyers of each school follow the text book of that school.

7. There are several legal works which are not used as text books in any particular school; but are regarded as of high authority, being cited as such in the text books. But the authority of these works is not binding on every point. The authority, however, of the particular text book of each school, is binding on the members of that school. The teacher is bound to make out that the text book adopted by him is infallible. If the teacher fails to justify everything that there is in the text book, then he would be considered unfit for his work, and he would fail to attract pupils. The teachers of the country, therefore, adopt that book as the basis of their teachings, which they themselves studied in their younger days. Thus it happens that all the great teachers of every school generally adopt that one book, as text book for their pupils, which is

garded as of unquestionable authority in the school, and hich answers best for argument with an adversary.

8. The books regarded as particularly authoritative in the several schools are mentioned below—

School	Books
1. Benares School	1. Mitakshara. 2. The commentary on Mitakshara by VishwesharaBhatta called Subodhini. 3. Vira Mitrodaya. 4. Kalpataru by Laksmidhara. 5. Dattaka Mimansa.
2. Dravira School (set up in the 13th century by Devanda Bhatta).	1. Mitakshara. 2. Shmriti Chandrika by Devanda Bhatta. 3. Parasara Madhavya by Madhavacharaya Vidyaranya. 4. Sarshati Vilas by Pratab Rudra Deo.
3. Mithila School (set up byChandeshwar, 1314. A. C. and Vachaspati Misra15th century).	1. Mitakshara. 2. Chintamani by Vachaspati. 3. Vivada Ratnakara by Chandeshwara.
4. Bengal School (founded by Jimutavahana, and Rughunandana, 15th century).	1. Dayabhaga. 2. Dayatatwa. 3. Daya Krama Sangraha. 4. The Commentary on Dayabhaga by Sreekristo. 5. Dattaka Chandrika by Raghumani commonly ascribed to Devanda Bhatta.
5. Maharashtra School (founded by Nilkanta in the 17th century).	1. Mitakshara. 2. Vyavahara Mayukha. 3. Nirnaya Sindhu of Kamalaker. 4. Dattaka Mimansa of Nanda Pundita.

SECTION VII.

THE TEST FOR DETERMINING BY WHICH SCHOOL A HINDU IS GOVERNED.

1. It has been already stated that Hindu law is purely personal. In whatever part of India a Hindu may reside the Hindu law applies to him as to inheritance, succession, marriage, &c. The Hindu law being different in the different schools mentioned in the last preceding section, the question arises, what school of law applies to a Hindu who migrates from one part of the country to another? The law, by which the Hindus are governed, being personal, mere change of residence cannot affect it. It has been accordingly said, "that if a person of a Mithila family living in Bengal continue the observance of the Mithila Shastar on occasions of marriages and mournings in his family, and have a Mithila Purohit to perform the ceremonies, his right to inheritance and other claims, were to be determined according to the Mithila Shastars; but that, if these ceremonies were performed according to the Bengal Shastars, his right of inheritance would be determined by the Bengal Shastars (Rutchaputty Dutt Jha *v.* Rajendra Narain Roy, 1 P. C. J., 167; Rani Padmavati *v.* Balu Doolar Sing, 1 P C. J , 348).

The test suggested by the decisions of the Courts of law.

2. *Primâ facie* any Hindu, residing in a particular province of India, is held to be subject to the particular doctrines of Hindu law accepted in that province. He would be governed by the Dayabhaga in Bengal, by the Vivada Chintamoni in north Behar and Tirhut, by the Mayukha in Guzrat, and generally by the Mitakshara elsewhere. If the family migrates from one part of the country to another, still the presumption is, that it retains the law of its former domicile, in the absence of evidence to the contrary. *(Per Curiam,* 12 M. I. A , 81).

3. The ruling laid down in Rutcheputty Dutt Jha *v.* Rajendra Narayan, and in similar other cases, involves the necessity of determining by what school the family has been governed as to marriages and mournings. It is difficult to weigh the evidence that is generally adduced in such cases: and it is well nigh impossible for a Judge, who is a foreigner, to pass any decision on such evidence. Nor does the ruling afford a safe test in all cases. For

stance, there are several families of Brahmins in Bengal, pecially in Nadiya and its neighbourhood, who immigrated om Mithila in the 17th and in the 18th centuries. Some the members of these families became and still are e leading Pandits of the country. They adopted the works of Raghunandana and Jimuta as their text books; and they became the chief exponents of the Bengal school. Sreekishen himself belonged to one of these families, if the information, which I have on the point, be not groundless. Now these families observe all their religious rites ccording to the authorities of the Mithila school. Their riests are generally of their own class, yet it cannot be aid that the law of the Dayabhaga does not apply to them. It has been already stated that a Pandit of the ame of Ram Gopal Nyalunkar was the first man in Nadiya make the study of Raghunandana and Jimutavahana an xclusive profession. Before his time the Pandits of Nadiya tudied the Nya philosophy as their main subject of study, and some of them studied the Shmriti works as an additional subject. But since the time of Ram Gopal, a great impetus was given to the study of the Shmritis of Raghunandana and the Dayabhaga of Jimutavahana. The choice of text books is a matter of great significance from the point of view of native Pandits. It shows what book is held by the Pandit as least open to exception. Such being the case, it would be hardly proper to say that the law of Dayabhaga does not apply to the family of Ram Gopal or Srikishen.

A test suggested.

4. In the case of Brahmins, it seems that the safest way to determine by what school of law any particular family is governed, is to ascertain what books are studied by the Pandits of the family, either in the past or in the present. If the family has never produced a Pandit, or if the family be of any other caste, then the question can be determined by ascertaining what text books are used by the Pandits who are usually consulted by the family as to marriage, mourning or inheritance. This, I should think, is the safest test, and is one which would very often lead to an easy solution of the question.

CHAPTER II.

SECTION I.

DEFINITIONS.

Gotra.—The name of the primitive sage from whom the Brahmins suppose themselves to be descended. The other castes have no Gotras of their own. they use the name of the Gotra of their priests.

Sagotra.—Persons descended from a common ance in unbroken lines of male descent.

Gotraja.—In the text of Yajnyavalkya, which enumera the heirs to a sonless man, the word denotes agna only, according to the Mitakshara. But in the Dayabhaga, the word is taken in its literal sense, *i. e.*, persons born in the family. Jimuta takes the word in the text to be an abbreviation for Gotraja Sapinda, *i e.*, Sapindas who are born in the family.

Sakulya.—Agnates or persons of the same Gotra who are not Sapindas.

Samanodakas.—Ditto ditto ditto.

Bandhus.—Generally used to denote sapindas of different Gotra.

Sapindas.—According to the Bengal School of law the word has three different meanings. (See the chapters on Marriage and Inheritance.) According to the Mitakshara, all those who are descended from a common ancestor within seven degrees on the father's side and five degrees on the mother's side are Sapindas.

Aurasa.—For the definition of Aurasa and other kinds of sons, see the chapter on Adoption.

Brahmo.—For the definition of this and other forms of marriage, see the chapter on Marriage.

Adhyagni.—For the definition of this and other kinds of Stridhan, see the chapter on Stridhan.

Niyam.—For the definition of this and other terms of Mimansa, see sec. II post.

Niyoga.—Appointment to raise issue.

Section II.

RULES OF INTERPRETATION.

Hindu law is founded on the texts of Vedas, Shmritis, Purans and Tantras. The texts, on which the fabric of Hindu Law is founded, are very few in number, and apparently as simple as possible, in most cases. But the commentators have exhausted all their ingenuity in interpreting the texts, in different ways, to suit their peculiar views. Rules of interpretation and legal maxims have thus grown up, without a knowledge of which it is simply impossible to go through the discussions in Hindu law books like the Mitakshara or Dayabhaga.

Many of the rules are derived from the Mimansa Darsan and the Karikas of Bhattapada. There are also some rules which are based on grammar; while there are others which are tacitly recognized by Hindu jurists. The grammatical rules cannot be explained in a foreign language like English. Of the other rules of interpretation, some of the most important are given below:

1. For every rule of law there is a text in the Vedas. If a text is not to be found in the Vedas corresponding to the rule, then the existence of such a text is to be taken for granted.

2. It is not proper to postulate the existence of too many texts, if the object is attainable by taking for granted a fewer number.

The result of this rule is, that generalization must be made wherever possible.

This rule of interpretation is illustrated in the discussion in Chapter VI, Section I of the Dayabhaga, where it is shewn that although several kinds of self-acquired property are declared as indivisible in the texts of Rishis, yet it is not necessary that more than one text should be presumed, to include all those different kinds of self-acquired property which are enumerated in the Shmritis. For if a text is postulated to the effect that "whatever is earned without detriment of the joint family property, that is indivisible" then all the texts of Shmritis on the subject may be deduced from the same.

3. Then again there is a rule of interpretation that when a text of the Vedas is postulated, it should contain

the fewest number of words. This rule is known under the title of Holakadhikarna. It is the 8th topic of the third chapter of Jaimini's Mimansa. For the application of this Adhikarana, or rule of interpretation, see Dayabhaga, chap. II, para. 40, chap. VI, sec. 1, para. 22.

4. Effect should be given to every text and every word in a text. It is never to be supposed that any text or word in a text is without scope for application, or unnecessary. It is equivalent to the rule of English law that "a Statute ought to be so constructed, that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant." (Reg. *v.* Bishop of Oxford, L. R. 4. Q, B. D., 245.)

5. It is said that "wherever contradictions exist between the Vedas, Shmritis and Purans, there the text of Vedas is to be followed; but where a contradiction exists between Shmriti and Puran, there the text of Shmriti is to be regarded as of higher authority." This rule of interpretation is contained in a text of Vyasa. But it is not of much practical importance. For Hindu lawyers never admit that there can be any contradiction between authoritative texts. In the discussions in modern legal treatises, all the texts are regarded as equally authoritative, nay, sometimes, texts of Purans are allowed to override Vedas and Shmritis.

6. Where there is an evident contradiction, the modern commentators, sometimes, explain the same by laying down that the rule is optional. There is a passage of the Vedas which directs that "at the Atiratra sacrifice the Sodrasi should be taken." There is another passage which on the contrary provides that "at the Atiratra the Shodrasi be not taken." It is hence inferred that the Sodrasi may optionally be used or not, at the ceremony called Atiratra. (Jaimini's Mimansa, 10, 8, 4.)

7. Sometimes, the apparent contradiction is explained by shewing that the texts have different fields for application. For instance, there are some texts according to which the son born after partition is entitled to the share of the father only. While there are others which declare that on the birth of a son after partition, it is to be revised. Jimutavahana reconciles the apparent contradiction, by laying down that the former applies to the self-acquired property of the father, and the latter to ancestral property. (Dayabhaga, chap. 7.)

In commenting on Jajnyavalkya, chap. II, v, 22 Vijna-shwar distinctly says, that any apparent contradiction, the written texts of law, must be explained either by assigning different fields, or by supposing that the one contains the general rule, and the other a special rule.

8. A principle of law established in one case may be extended to other analogous cases. This rule is applied in para. 36, sec. II of the Dattaka Chandrika where the author applies to Dattaka sons the laws that apparently apply only to the Kshetraja. The maxim is—

बहूनामेक धर्म्माणा मेकस्यापि यदुच्यते ।
सर्व्वेषा मेव तत् कुर्य्यादेकरूपा हि ते स्मृताः ॥

Where the application of the rule is based on remote analogy, it is called अतिदेश. The nature of an अतिदेश cannot be better explained than by the remarks made by Lord Bacon with reference to the principle "Love thy neighbour as thyself."

A brother's son is said to be equal to a son; and a co-wife's son is also said to be equal to a son These are instances of अतिदेश; and it is not to be supposed that a brother's son or a co-wife's son are exactly equivalent to a son of the body. All that is meant is, that for certain purposes, they are almost as beneficial as a son of the body. (Dattaka Chandrika, Sec. I; Dayabhaga, chap. XI, Sec. V, para. 7.)

9. Every rule of law is either a नियम (injunction) or विधि (precept) or परिसंख्या (declaration of limit), or अनुवाद (statement of a known or admitted fact). Bhattapada says:

विधिरत्यन्त मप्राप्तौ नियमः पाक्षिके सति ।
तत्र चान्यत्र च प्राप्तौ परिसंख्येति गीयते ॥

Precepts or विधि are either positive or negative. When a precept enjoins men to do a certain act, for the doing of which no reason could be suggested, it is called n *Utpatti-vidhi.* The rule, which requires the recitation prayers, in the morning and evening, is an *Utpatti-vidhi;* for, but for it, the recitation would not be done. When a precept forbids men to do what they may do, under natural impulses, it is called a निषेध विधि or prohi-

bitory precept, as for instance, the rule which forbids the eating of flesh, on the 8th day of the moon.

An injunction is a rule directing the doing of an act at a particular time or place or in a particular manner, the act itself being such, that it would be done even in the absence of any rule in the Shastars. For instance, the rule which requires that, at the Bratriditya festival, a man must eat some food from the hands of his sister, is a नियम or injunction. The act of eating is done out of natural impulse. The direction, that men should take the food given to them by their sisters, makes it an injunction by obeying which some invisible effect is produced in addition to the visible effect—satisfaction of hunger.

A परिसंख्या is an implied prohibition. For instance, there is a text which declares that the five animals which have five claws may be eaten. Now the eating of flesh is prompted by natural impulse. The text would therefore be unnecessary if it meant nothing more than is positively declared by it. But a text cannot be unnecessary; and therefore it must be taken to mean by implication that the flesh of other animals is not to be eaten.

A text which is neither a नियम nor a विधि nor a परिसंख्या is necessarily अनुवाद or the recitation of a known or admitted fact. Ordinarily it is not proper to interpret a text in such manner as to make it a परिसंख्या or In certain cases, however, अनुवाद must be accepted. *Anuvada* is of two kinds. It may be either necessary or unnecessary. If it can be shown, that there is some necessity for the text, notwithstanding that it recites nothing more than an admitted fact, then there can be no objection towards interpreting it as an Anuvada. An interpretation, which would make a text of law an unnecessary recitation of a known fact, can never be accepted. For a text of the Shastars cannot be unnecessary or superfluous.

The distinction between नियम, विधि, परिसंख्या and अनुवाद is of the greatest importance in Hindu jurisprudence. The importance of the distinction is illustrated in the very first chapter of the Dayabhaga, in the discussion with reference to the following text of Manu:—

ऊर्द्धं पितुश्च मातुश्च समेत्य भ्रातरः समं ।
भजेरन् पैतृकं ऋक्थ मनीशास्ते हि जीवतः ॥

Manu, chap. IX, 104

Nothing could be simpler apparently, than this text. ut the considerations, which Jimutuvahana introduces, nder the interpretation of the passage hopelessly diffi-

The plain meaning of the text is that "after the death of the parents let the brothers divide the paternal wealth, for during the lifetime of the parents they are not independent." Jimuta says, that this text cannot be a नियम; for it is certainly not meant that any sin is incurred by not dividing. Manu himself has declared, in another text, that it is optional with the coparceners to remain joint or to separate.

Then it is shown that the text is not a विधि. For the act of division may be done out of natural impulses, irrespective of any rule of the Shastars.

Jimutavahana then goes on to show that it is not a परिसंख्या; for it is not proper ordinarily to accept an interpretation which makes a text of law a परिसंख्या.

Jimutavahana therefore arrives at the conclusion that it is an अनुवाद. But it is a necessary अनुवाद; and therefore there can be no objection to accepting it in that light. What is meant is, that the sons become owners after the death of the father. If the sons be then owners, their right to divide follows as a matter of course. The declaration that the sons may divide the paternal wealth is अनुवाद. But it is meant to imply that sons become owners after the father's death and not before; and therefore the text is a necessary one.

The controversy, regarding the legality of polygamy, turned in a great measure on the distinctions under consideration. The fact is, that it is of great importance in Hindu jurisprudence; and the practitioner as well as the student must constantly bear in mind the nature of it.

10. A text quoted by an authoritative writer is of greater authority than one that is not quoted or commented on in any book.

11. A text must be accepted as it is. Bhattapada says वचनं वाचनिकं

12. Wherever possible, the texts ought to be so interpeted as to shew that the rule of law has its foundation reason. Brihaspati says—

केवलं शास्त्रमाश्रित्य न कर्त्तव्य विनिर्णयः ।
युक्तिहीन विचारे तु धर्म्महानि प्रजायते ॥

25. If a doubt arises as to the import of
declares a limit then the highest limit, oug
The rule is

26. According to some jurists the tech
of a compound word is more acceptable tha
which follows from the component word

यौगिकनामावयवप्रसिद्ध्यपेक्षया प्रयोगसमवायेन रौढिकाया ए

But on the other hand it is maintained by
literal meaning is more acceptable tha
meaning. Mit. Chap II, Sec XI para 3.

27. When several alternatives are pro
pounded, in the same sentence, with the w
an indication that the author does not a
them. As an illustration, see para. 44,
XI of the Dayabhaga where the author e
several different ways in which the widow b
of her deceased husband. The fact is, t
succeeds on the basis of the texts of Yaj
Vishnu, and not because she confers any be

Section III.

LEGAL MAXIMS.

1. Property can never remain in abe
must be some legal owner.

2. Property is for enjoyment and ac
merit.

दानभुक्तफलं धनं—(Dayabhaga, Chap. XI,
13.)

यज्ञार्थंधनमुत्पन्नं—(Mit , Chap. II, Sec. I, p

3. None but a living human being ca
of property.

It is doubtful whether, according to the s
of Hindu Jurisprudence an idol can be the
property. A relinquishment, in favour o
amount to a sacrifice; but it can neve
gift. A gift can be made only in favour
being. But the gods, in whose favour sacri
are not sentient beings, they having no

But the gods that are worshipped in a sacrifice h
existence apart from mantras

However that may be, the people of the country gen
believe that property can stand in the name of a
and as they act according to that belief, the Courts c
do otherwise than give effect to that belief.

4. The law ought not to be such as to render a
incapable of acquiring or holding property Acc
to Hindu lawyers, every human being ought to hav
property as he can call his own, in order that it ma
be impossible for him to perform acts of religious
(Dayabhaga, Chap. I, para. 17.)

5. Ownership is acquired by such lawful
as Inheritance, Purchase, Partition, Seizure, Fi
Acceptance (for Brahmins), Conquest (for Kshet
Gains (for Vaishyas and Sudras). Property is a mat
popular recognition, and it may be acquired by any
mode recognized in the world as a mode of acquirin
perty. Property is not acquired by theft, because th
not considered as a mode of acquisition, by the
generally.

6. Ownership is extinguished by sale, gift, c
degradation, and change of religious order.

7. Wherever persons, standing in a certain deg
relationship, inherit as heirs they take equal shares, u
there is an express rule of law providing otherwise.
Dayabhaga, Chap. IV, Sec. II, para. 8). The maxim
स्याद्‌तुल्यताविशेषत्व.

8. The ordinances of the Shastars apply to the
and pure. For the maxim is—

शुचौ तस्माच्च शौचे कर्म कुर्य्यात्

It is generally supposed that, according to Jimuta
soul of a deceased person is benefitted by his mat
uncle and the rest; because the maternal relations
form a duty, which the deceased was bound to perfo
his lifetime. But the fact is, that after a man's deat
duty of performing the shradh of paternal or mat
ancestors ceases to be binding on him; and if the
tives, on the maternal side, give pindas to the same a
tors, they do so on their own account. The decease

25. If a doubt arises as to the import of a word which declares a limit then the highest limit, ought to be taken. The rule is

26. According to some jurists the technical meaning of a compound word is more acceptable than the meaning which follows from the component words. It is said

But on the other hand it is maintained by others that the literal meaning is more acceptable than a technical meaning. Mit. Chap II, Sec XI para 3.

27. When several alternatives are proposed or propounded, in the same sentence, with the word वा (or) it is an indication that the author does not approve any of them. As an illustration, see para. 44, Sec. I, Chap. XI of the Dayabhaga where the author enumerates the several different ways in which the widow benefits the soul of her deceased husband. The fact is, that the widow succeeds on the basis of the texts of Yajnyavalkya and Vishnu, and not because she confers any benefit.

SECTION III.

LEGAL MAXIMS.

1. Property can never remain in abeyance. There must be some legal owner.

2. Property is for enjoyment and acts of religious merit.

दानभोगफलं धनं—(Dayabhaga, Chap. XI, Sec. VI, para. 13.)

यज्ञार्थं धनमुत्पन्नं—(Mit , Chap. II, Sec. I, para. 14.

3. None but a living human being can be the owner of property.

It is doubtful whether, according to the strict principles of Hindu Jurisprudence an idol can be the owner of any property. A relinquishment, in favour of an idol, can amount to a sacrifice; but it can never amount to a gift. A gift can be made only in favour of a sentient being. But the gods, in whose favour sacrifices are made, are not sentient beings, they having no existence apart from the mantras. There may be such gods as Indra.

But the gods that are worshipped in a sacrifice have no existence apart from mantras

However that may be, the people of the country generally believe that property can stand in the name of a god; and as they act according to that belief, the Courts cannot do otherwise than give effect to that belief.

4. The law ought not to be such as to render any one incapable of acquiring or holding property According to Hindu lawyers, every human being ought to have such property as he can call his own, in order that it may not be impossible for him to perform acts of religious merit. (Dayabhaga, Chap. I, para. 17.)

5. Ownership is acquired by such lawful means as Inheritance, Purchase, Partition, Seizure, Finding, Acceptance (for Brahmins), Conquest (for Kshetriyas), Gains (for Vaishyas and Sudras). Property is a matter of popular recognition, and it may be acquired by any other mode recognized in the world as a mode of acquiring property. Property is not acquired by theft, because theft is not considered as a mode of acquisition, by the people generally.

6. Ownership is extinguished by sale, gift, death, degradation, and change of religious order.

7. Wherever persons, standing in a certain degree of relationship, inherit as heirs they take equal shares, unless there is an express rule of law providing otherwise. (See Dayabhaga, Chap. IV, Sec. II, para. 8). The maxim is स्यादनुतमाद्विशेषस्य.

8. The ordinances of the Shastars apply to the living and pure. For the maxim is—

शुची तत्कारक जीवी कर्म कुर्य्यात्

It is generally supposed that, according to Jimuta, the soul of a deceased person is benefitted by his maternal uncle and the rest; because the maternal relations perform a duty, which the deceased was bound to perform in his lifetime. But the fact is, that after a man's death, the duty of performing the shradh of paternal or maternal ancestors ceases to be binding on him; and if the relatives, on the maternal side, give pindas to the same ancestors, they do so on their own account. The deceased can derive no benefit whatever, from the performance of such acts by his maternal relatives.

9. Where the principal ceremony or act is omitted, it must be performed over again with all incidental ceremonies. But where the principal ceremony is performed, it need not be repeated on account of the omission of an incidental ceremony. Nor is the incidental ceremony to be performed separately. The Chandoga Parishishta says :

प्रधानस्याक्रिया यत्र साङ्गं तत् क्रियते पुनः ।
तदङ्गस्याक्रियायान्तु नावृत्तिर्नैव तत्क्रिया ॥

In a shradh the principal ceremony is the feeding of a Brahmin. The giving of pinda is an incidental ceremony, which need not be repeated, or performed separately if omitted at first. So the ceremony of Bridhi shradh is an incidental ceremony, which is performed before marriage and other regenerating rites. But the Bridhi shradh being an incidental rite, its omission does not necessitate the re-performance of the entire ceremony. Nor is it necessary to perform the incidental ceremony, separately, afterwards.

10. There are certain acts, the performance of which is enjoined only in case certain other acts are performed. For the application of this principle, see Dattaka Mimansa, sec. VI, para. 24, and Dattaka Chandrika, sec. I, para. 24.

By mixing sour milk in boiled milk, the curd denominated आमिक्षा is produced and incidentally whey is produced. The curd called आमिक्षा is given to the Vaishwadeva set of divinities; the whey is given to horses. If the curd is wanting, then in order to produce curd the act of mixing boiled milk with sour milk must be performed. But if the watery portion called whey is spoilt, before being given to horses, then the admixture need not be made, though it be ordained that, as a part of the ceremony, the watery portion should be given to horses. Similarly the Parvana of the maternal ancestors is enjoined only when the Parvana of the paternal ancestors is performed The law is—

पितरो यत्र पूज्यन्ते तत्र मातामहा ध्रुवं ।
अविशेषेण कर्त्तव्यं विशेषान्नरकं व्रजेत् ॥

But if the anniversary of a paternal ancestor falls on a Parvana day, and the shradh of the paternal ancestor is performed as an *ekodista*, then the paternal ancestors need not be worshipped again according to Parvana rite

and the maternal ancestors need not, therefore, be worshipped at all.

11. The repetition of an established rule is for the purpose of making it obligatory. The maxim being सिद्धे सति आरम्भो नियमाय. (See Dattaka Chandrika, Sec. III.)

12. *Cessanti ratione cessat et ipsa lex* is a principle very often recognized in Hindu law. As an instance, see Chandrika, sec. I, para. 28.

13. It is a maxim of Hindu law, in cases of adoption, "that permission is to be presumed in the absence of prohibition" अप्रतिषिद्धं परमतमनुमतं. (Dattaka Chandrika.)

14. An invisible effect cannot be brought about by a visible cause.

For instance, marital dominion is acquired by gift of the bride. But the relationship of husband and wife, which is an invisible entity, cannot be created except by mantras.

15. A visible effect cannot be produced by a text of the Shastars.

For instance, the essential nature of ownership is power of absolute disposition. If it be admitted that a man is the owner of any property, it follows as a matter of course that he has power to make a sale or gift of it. If there be a text prohibiting the sale or gift of such property by such person, then the text cannot affect the validity of the transfer. The transferer incurs sin by violating the injunction; but the transfer cannot be regarded as void. For as Jimuta says "a thing cannot be altered by a hundred texts."

16 Where the members of any class are possessed of opposite attributes, the law with reference to such class, is based on the attributes or wants of the majority. The maxim is—

विरुद्धधर्म्मे समवाये भूयसां स्यात् सधर्म्मकत्वं

As an illustration of this maxim, the following text of Chandoga Parishishta is usually cited—

अदन्तकः पूषा पैष्टमत्ति सदा चरुं ।
अग्नीन्द्रचरुसामान्यात् तण्डुलाश्च विधीयते ॥

(Though the sun is toothless, and always eats *charn* made of powdered rice, yet [in the ceremony of dedication of bull] boiled rice is prescribed, for the sake of the

gods Fire, Indra and Siva who are worshipped simultaneously.)

17. When there are several ways prescribed for attaining the same object, the most difficult way is the proper one. For, if the object could be attained by the less difficult ways, then the texts prescribing the more difficult ways would be useless. The maxim is—

सम्भवति लघूपाये गुरूपायस्यानुष्ठानवचसा ऽऽनर्थक्यं स्यात्

The following penalties are prescribed for expiation of महापातक (high crimes) such as intercourse with step-mother, drinking of wine, stealing more than 1 tola of gold, killing of Brahmins, &c. committed in full knowledge.

1. Death by burning in husk of rice.
2. Bathing in the Ganges.
3. Repeating the name of Vishnu.

Here if such crimes, as those mentioned above, could be expiated by bathing in the Ganges, or by repeating the name of Vishnu, then the text, which prescribes death by burning, would be useless. The texts which declare that the most heinous crimes can be expiated by bathing in the Ganges, or repeating the name of Vishnu must therefore be explained away as merely स्तुतिवाद an hyperbolical description of the merit of bathing in the Ganges, and repeating the name of Vishnu. Or it may be said that few men are qualified to bathe in the Ganges, or to utter the name of Vishnu.

18. The attributes of the person entitled to do any act are known in three different ways, namely, by capability, prohibition, and qualifying terms. The maxim is—

निषेध ज्ञायते कर्ता विशेषेण प्रतिक्रियं ।
योग्यत्व प्रतिषिद्धत्व विशेषण पदान्वयैः ॥

The Shastars do not require a person to do an act, which he is incapable of doing, according to the rules prescribed. A dumb man cannot adopt. Because, it is prescribed that the adopter must utter certain mantras. Females could not have adopted, but for special texts which entitle them to do so, and on account of which the utterance of mantars are dispensed with, in the case of females.

Then the rule, that an only son should not be taken in adoption, shows that the father of an only son cannot give the only son in adoption.

19. If the thing required for any particular purpose is not obtainable, then such things as have resemblance to the same may be used instead. The maxim is—

यथोक्तवस्त्वसम्पत्तौ ग्राह्यं तदनुकारि यत् ।
यवानामिव गोधूमा व्रीहीणामिव शालयः ॥

According to this maxim barley may be used for wheat, sugar may be used for honey, oil for butter, &c.

20. What is done by a man, who has not the capacity to understand the nature of the business, on account of mental infirmity, is void. The maxim is—

स्वतन्त्रोपि हि यत् कार्य्यं कुर्य्यादप्रकृतिं गतः ।
तदप्यकृतमेव स्यादस्वातन्त्र्यस्य हेतुतः ॥

21. When the reasons for and against a point are nearly equal, a very little preponderance on one side would suffice to turn the scale. The maxim is—

अणुरपि विशेषोध्यवसायकरः

CHAPTER III.

Section I.

THE INSTITUTION OF MARRIAGE.[1]

The origin of the institution of marriage.

1. How the institution of marriage originated, and how it assumed different forms in different states of society, are questions which do not properly fall within the scope of this work. Marriage, in some form or other, is found to exist even among some of the least civilized races. It is not, however, to be supposed that marriage is a natural relation, and must have existed, from the beginning, in every society. "The lowest races" says Sir John Lubbock "have no institution of marriage; true love is almost unknown among them; and marriage in its lowest phases is by no means a matter of affection and companionship."*

2. The institution of marriage must be necessarily unknown in the primitive condition of man. It would, however, be erroneous to suppose that unqualified promiscuity could ever prevail. The natural craving for sexual enjoyment would lead the savage to keep within his power some member of the opposite sex. If the savage is capable of procuring food enough for himself and his consort, then such appropriation is easily accomplished. If any other member of the society attempts to disturb the possession of the first appropriator, then the latter would have the support of the society collectively. In this way the institution of marriage apparently originated.

3. In the primitive condition, the first appropriation has its origin apparently in force or enticement or purchase. But forcible seizure leads to breach of peace; and it cannot be countenanced by the people, even in the most backward state of society. It is also to be borne in mind that forcible seizure or fraudulent enticement is possible only for the more powerful and crafty members. The less powerful and crafty cannot effect the necessary

* Origin of Civilisation, 3rd Ed., p. 67.

appropriation except by purchase; and when purchase is once recognized as a title giving a right to appropriation, society can no longer tolerate forcible seizure.

Sometimes the parents would give a daughter to a powerful chief without taking any price. Sometimes one powerful chief would give his daughter to another as a free gift, only insisting that the son begotten of such girl should succeed as heir. Whenever a girl is given as a free gift, it is but natural that the parents should also insist upon the donee to treat the girl with respect and to be faithful to her.

4. When the gift or purchase of a girl is made privately, without ceremonies, it is possible for the donee or purchaser to ignore the fact, or at least to disavow the original conditions. Such disavowal must give rise to quarrels, to prevent which, the early legislators insist upon the utmost publicity. Occasions for festivity are eagerly welcomed in every state of society; and when ceremonies are prescribed by the early legislators, the parents observe those ceremonies, not only for the sake of publicity, but in order to please neighbours and friends. Each marriage thus becomes an occasion for festivity. And in course of time, it comes to be believed that marriage cannot take place without ceremonies. Where ceremonies are duly observed, in celebrating a marriage union, then it becomes far stronger than where it it is effected privately by force, fraud or purchase. The ceremonies create a deep and lasting impression on the minds of the parties and of their neighbours. They all naturally come to suppose that the relation, thus solemnly created, cannot be severed and is inviolable. When such is the case, the obligations and rights of the parties are easily perceived, and become capable of being enforced. Legislators then define those rights and duties, and save the parties the trouble and inconvenience of entering into a regular contract, in every case, in order to regulate the future life of the married pair.

Different forms of marriage.

5. India is regarded as an epitome of the whole world in respect to the variety of its climate, flora and fauna; and it is equally so in ethnology. In the different parts of India are to be found all the different stages of social progress, from that of the highly cultured Brahmin to the savage inhabitants of Assam, Sirguja and the Garo Hills.

Indian life thus presents almost every possible form of conjugal relation, from the grossest polyandry verging on promiscuity to the most rational form of monogamy. Such being the case, Hindu lawyers recognize no less than eight different forms of marriage, differing from one another, in no slight degree. Most of these forms are strongly condemned by the sages. But the legislator, who has to make laws for different societies, cannot but take into account the customs which prevail therein. He cannot paint an ideal picture of what ought to be. He must prescribe rules for the guidance of society; and he cannot make sudden or violent innovations. The utmost that he can do is to disapprove those practices which he would abolish altogether if he possibly could do so by legislation.

Section II.

MARRIAGE ENJOINED AS A DUTY IN THE HINDU SHASTARS.

)bject of ırriage ac- rding to › Shastars

1. Hindu lawyers generally overlook the temporal object of marriage, and represent it as something productive of religious merit. In enjoining marriage, Hindu lawyers never assign any of those reasons which, from a rationalistic point of view, render the institution of marriage necessary for the existence and well-being of society. It is true, that the institution of marriage makes men more peaceful and industrious; it is true that without it the rearing of children would he imperfectly provided for; it is true that the life of man in old age becomes extremely miserable without that assistance which can be had only from a married wife. All these temporal objects are too obvious not to be perceived by the great sages. But they could hardly attain their object, if they openly avowed these temporal reasons, for insisting on the members of the society to go through marriage according to law. To enforce obedience, the sages assigned spiritual reasons which have a far greater influence on the ignorant, than obvious matters of fact.

2. Marriage, according to Hindu law, is not a mere civil contract, but a Sangskara or sacrament necessary for

complete regeneration, except in the case of a male marrying a second time. It is ordained—

एवमेनः शमं याति बीजगर्भसमुद्भवं ।
चिपं कर्म्म यथानेकं रजस्वलोदाहृते शनैः ॥
ब्राह्मणस्यापि तद्वत्स्यात् संस्कारैर्विधिपूर्व्वकैः ।

Thus in order to remove the taint of seed and womb, no less than ten different ceremonies are prescribed, for the twice-born, of which marriage is the last. For Sudras and females marriage is the only purifying ceremony.

3. By Hindu law, marriage is enjoined as a sacred duty; and the leading of a life of celibacy is condemned for ordinary men. It is declared—

न गृहं गृहमित्याहुर्गृहिणी गृहमुच्यते ॥
तया हि सहितः सर्व्वान् पुरुषार्थान् समश्नुते ।

[A house is not house; but wife is house; for religion, wealth or pleasure cannot be enjoyed except in the company of the wife.]

Manu says—

गुर्व्वन्तरं समावृत्य कुर्य्याद्दारपरिग्रहं ॥

[After having returned from the house of his preceptor, a man should marry.]

The necessity of the wife's company, in performing acts of religious merit is so great, that king Rama was obliged to have an effigy, made in gold, of his banished wife Sita when he performed the horse sacrifice.

4. According to Hindu lawyers, marriage is necessary—

(1) Because it is one of the ten Sangskars or purifying ceremonies which are required for the removal of the taint of seed and womb and for complete regeneration.

(2) Because a son is absolutely necessary for deliverance from hell, and for payment of the debt due to ancestors.

(3) Because a man who is not married cannot perform some of the most important religious acts.

5. It is difficult for a man, who has wife and children, to maintain the sacred character of a priest or religious teacher. Most other religions, therefore, inculcate that

the priest must not marry. But it is impossible to fight against nature; and the priest, who lives a life of celibacy, generally brings disgrace upon himself and his religion. The Brahmins, with their superior wisdom, enjoined marriage as a religious duty. The Brahmin, who marries, does not, therefore, fall in the estimation of the people. While, being married, he cannot be tempted to do such acts as may bring disgrace upon him; and having children he is enabled to make his profession heriditary.

Section III.

WHO ARE COMPETENT TO MARRY.

1. Hindu lawyers regard the bridegroom as the party who marries; and the bride as the party who is taken in marriage.

Limit of ...ge according to the ...hastars.

According to the strict rules laid down by the early legislators, a man is not competent to marry before the age of 24; Manu says—

त्रिंशद्वर्षो वहेत्कन्यां हृद्यां द्वादशवार्षिकीं ।
त्र्यष्टवर्षोऽष्टवर्षां वा धर्मे सीदति सत्वरः ॥

Manu IX, 94.

[A man of 80 years should marry a girl of 12; and a man of 24 should marry a girl of 8; one marrying earlier incurs sin.

2. The words "incurs sin" at the end shew that the rule is absolutely binding, and not merely a moral precept. It is also a significant fact that the early sages make no provision for guardianship, in marriage, of males under age. However that may be, minors now marry; and the practice is countenanced by modern commentators. According to Raghunandana any one, who understands what marriage is, may marry. This is in accordance with the maxim referred to in page 58 *ante*.

3. In actual practice, minors are sometimes married at the age of 8 or 9, at which time they cannot possibly have any idea as to what marriage is. In the case of Brahmins, the ceremony of investiture with the sacred thread may take place at the age of 8; and the marriage ceremony sometimes takes place immediately afterwards. The earlier

...arriage of ...iors com... among Hindus.

sages indeed ordain that marriage should take place after the period of studentship is over. But, at the present time, the period of studentship, according to the sacred law, is finished within a few days after investiture. In some cases, the period is made to last only for a few hours. The period of real studentship now commences before investiture; and as a general rule marriage takes place during the continuance of that period. Thus the letter of the old law is nominally adhered to; but the actual practice is altogether inconsistent with it.

The Indian Majority Act.

4. Marriage being one of the matters not affected by the provision of the Indian Majority Act (IX of 1875)—for the purpose of marriage, a Hindu attains majority on completing his fifteenth year The consent of father or other guardian has been held to be necessary, in case of the marriage of a boy who is a minor. (Nundlal Bhagwandas v. Tapudas, 1 Morley, 287)

Guardian's consent.

5. The want of the guardian's consent does not invalidate a marriage otherwise legally contracted. (Madhosoodun Mookerjee v Jadub Chunder Banerjee, 3 W. R. 194; Baee Rulyat v Jey Chund Kewal, 3 Morley, 181)

6. The marriage of a Hindu minor is not only allowable, but has been held to be a legitimate cause of expense in regard to which his guardian has power to bind him. (Jogeshwer Sircar v. Nilamber Biswas, 3 W. R. 217.)

The competency of idiots and lunatics to marry.

7. The duties prescribed by the Shastars are enjoined only on those who are capable of performing them. (See page 58 *ante.*) The idiot and the lunatic being incapable of uttering mantras cannot possibly go through the ceremony of marriage. Then again there cannot be a complete gift in favour of a person who is incapable of accepting. But it has been held that persons of unsound mind, *i. e.*, idiots and lunatics, though disqualified for civil purposes, a[illegible] petent to marry. (Dabee Charan Mittra v. Radha [illegible] Mittra, 2 Mor. 99.)

8 According to Raghunandana the party marrying must [illegible] capacity to understand what marriage is. The [illegible] laid down in Dabee Charan v. Radha Charan is, there[illegible] fairly open to question, according to the letter of the [illegible] though in actual practice the marriage of idiots and [illegible] does take place. A minor has presumably some capacity to understand the nature of the transaction; but a lunatic can have none. It would be contended that the

want of capacity, on the part of the bridegroom, to understand what he is about, is rectified by the consent of his guardian. But the question is, whether an act like marriage can be done by a guardian who is only a self-constituted agent. An agent duly appointed can do most things that a man himself can do. But there are certain acts which even a duly appointed agent cannot do. Optional Srauta acts cannot be performed by an agent; for the law is—

श्रौतं कर्म्म स्वयं कुर्य्यादन्योपि स्मार्त्तमाचरेत् ।
अशक्तौ श्रौतमप्यन्यः कुर्य्यादाचारमन्ततः ॥

[Acts prescribed by the Vedas must be performed by a man himself; acts prescribed by Smritis may be performed by an agent. If a man becomes incapable of finishing an optional Srauta act after commencement then it may be finished by another]

'he com-
ency of
uchs to
rry

9. There are indications in the Shastars that an eunuch or impotent person may lawfully marry. But an eunuch can have no natural inclination to marry; and the rules which enjoin marriage are evidently not applicable to eunuchs, the masculine gender being used definitely. Even supposing that an eunuch could marry when the begetting of Kshetraja sons was legal, yet at the present day the marriage of an eunuch must be held invalid, though the sentiments of orthodox Hindus are against giving the girl in marriage again, it being laid down in Manu "once only is a girl given in marriage."

'he deaf
l the
mb and
·sons
ected with
urable
ease.

10. Persons who are deaf or dumb or are affected with loathsome and incurable maladies cannot go through the ceremony of marriage, though if a girl is actually given, the gift may not be held void. Such persons are not entitled to enforce restitution of conjugal rights. (Bai Prem Bhukar *v.* Bhikhu Kahanji, 5 Bomb, 209.)

Even after betrothal a girl may not be given to affected with a loathsome or incurable disease, or to who has become an apostate—

कुलशील विहीनस्य षण्डादि पतितस्य च ।
अपस्मारी विधर्म्मस्य रोगिणां वेषधारिणां ॥
दत्तामपि हरेत्कन्यां सगोत्रोढां तथैव च ।

Vashistha

11. Hindu law forbids the marriage of a younger brother while an elder brother is unmarried. The rule is imperative. But if the elder brother be living in a foreign country, or if he is mad, or if he is an idiot, or if he is an eunuch, or if he is degraded, then Parivedana is not illegal. The marriage of an younger brother before an elder step-brother is not illegal.

Marriage of younger brother prohibited while there is an elder brother living.

12. A boy given in adoption may be married before his elder uterine brother, the adopted son's connection with the family of the natural father being severed by adoption.

13. An aurasa son born after a child is taken in adoption may be married before the adopted child, an adopted son not being entitled to the honour of an eldest son where an Aurasa is born afterwards:*

Devala.

14. The taking of a second wife, in the lifetime of one previously married, is declared as allowable under certain circumstances. Jajnyavalkya says—

Polygamy.

सुरापी व्याधिता धूर्ता वन्ध्यार्थघ्न्यप्रियंवदा ।
स्त्रीप्रसूश्चाधिवेत्तव्या पुरुषद्वेषिणी तथा ॥

[One who drinks inebriating liquors, who is incurably diseased, who is quarrelsome, or barren, who wastes his wealth, who speaks unkindly, who brings forth only daughters, may be superseded by another wife; and so may she who manifests hatred to her husband.]

Manu says—

मद्यपासाधुवृत्ता च प्रतिकूला च या भवेत् ।
व्याधिता वाधिवेत्तव्या हिंस्रार्थघ्नी च सर्वदा ॥
वन्ध्याष्टमेऽधिवेद्याब्दे दशमे तु मृतप्रजा ।
एकादशे स्त्रीजननी सद्यस्त्वप्रियवादिनी ॥
या रोगिणी स्यात्तु हिता सम्पन्ना चैव शीलतः ।
सानुज्ञाप्याधिवेत्तव्या नावमान्या च कर्हिचित् ॥

(Manu, Chap. IX, vv. 80, 81, 82.)

15. The rules contained in these texts are evidently not विधि; for there cannot be a विधि for the doing of an act which would be done out of natural inclination. Nor

* (Dattaka Chandrika, Chap. IV, para. 6, and Chap. V, para. 15.)

are these rules नियम ; for it cannot be said that any sin is incurred by not marrying a second wife under the circumstances. Pundit Ishwar Chand Vidyasagar says, that these rules are परिसंख्या ; and if his view is correct, then the marriage of a second wife, during the lifetime of the first, is illegal except under the circumstances mentioned in the text. There is certainly great weight in Pundit Vidyasagar's reasoning. But there are so many indications, as to the legality of polygamy, in the Shastars, and the practice is so common that his interpretation cannot be accepted as law. There is, in fact, no other alternative than to say that the texts are अनुवाद or declaratory of known and admitted facts, so that a second wife may be taken in the lifetime of the first, even without any justifying cause.

SECTION IV.

WHO CAN BE TAKEN IN MARRIAGE.

The girl must be of the same caste.

1. The girl to be taken in marriage must be of the same caste. In former times, a girl of a lower caste could be taken in marriage. But intermarriage between the several castes is forbidden in the present age. There is no express prohibition in the Shastars, as to intermarriage between several classes of the same caste. But it has been held that such intermarriage is invalid unless sanctioned by usage. (Narain Dhara *v.* Rakhal Gain, I. L. 1 Cal., 1; Mela Ram Nadiyal *v.* Tana Ram Bamun W. R. 552.)

Must be younger in age and smaller in stature.

2. The girl to be taken in marriage must be youn-, in age, and smaller in stature. not (Bai

Should be a maiden.

3. She should be अनन्यपूर्वा, *i. e.*, not married to else before. There are texts which lay down that to one can be given in marriage only once Manu says— to one

सकृत्कन्या प्रदीयते ।

A widow may be taken in marriage now.

But there are also texts which authorize the mar a widow. Whether the marriage of a widow c place is therefore a disputed question of Hindu la a matter of practice, widows are never married am Hindus. But the question is not now of much p

importance, as the legislature has declared the marriage of a Hindu widow to be legal and valid by Act XV of 1856.

4. A girl of any age can be taken in marriage. But according to the Shastars, the proper age for the marriage of a female is the eighth year. All the sages enjoin that a girl should be, given in marriage before puberty. Excepting in the families of some of the Kulin Brahmins of Bengal, it is very rare to find a Hindu girl above the age of puberty remaining unmarried. Fear of shame that attaches to a family, in which a girl attains puberty, before marriage, makes every Hindu father anxious to dispose of his daughter in marriage before maturity. Generally speaking, girls are married between the eighth and twelfth years.

The proper age for the marriage of a girl.

5. A girl whose elder sister is unmarried is declared as not eligible for being taken in marriage.

6. A girl who has no brother may be taken in marriage. But such marriage ought to be avoided. For the father of the girl would have some right over the son begotten on her.

A girl who has no brother may be taken. But such marriage ought to be avoided.

7. The marriage of a woman whose husband is living is absolutely prohibited; and is punishable under sec. 444 of the Indian Penal Code.

8. A girl betrothed to another may be taken in marriage. Jajnyavalkya says—

A girl betrothed may be taken.

दत्तामपि हरेत्पूर्वात् श्रेयांश्चेद्वर आव्रजेत् ।

Jajnyavalkya II, 65.

But marriage with a betrothed girl is not proper.

9. Marriage with a girl having any of the visible defects mentioned in the following text of Manu ought to be avoided, if possible—

हीनक्रियं निष्पुरुषं निश्छन्दो रोमशार्शसं ।
क्षय्यामयाव्यपस्मारि श्वित्रिकुष्ठि कुलानि च ॥
नोद्वहेत् कपिलां कन्यां नाधिकाङ्गीं न रोगिणीं ।
नालोमिकां नातिलोमां न वाचाटां न पिङ्गलां ॥

family which has omitted prescribed acts of reli- which has produced no male children; that in the Vedas have not been read; that which has thick the body; and those subject to phthisis, to dyspep- epilepsy, to leprosy and elephantiasis. Let him not a girl with reddish hair, nor with deformed limb;

15. not act whi

* (D

nor one troubled with habitual sickness; nor one either with no hair or with too much; nor one immoderately talkative; nor one with inflamed eyes.—(Manu, chap. III. 7 and 8.)

SECTION V.

DEGREES OF RELATIONSHIP WITHIN WHICH MARRIAGE IS PROHIBITED.

1. The most important rule, defining the limits within which marriage is prohibited, is contained in the following sloka of Manu and Satatapa.

असपिण्डा च या मातुरसगोत्रा च या पितुः।
सा प्रशस्ता द्विजातीनां दारकर्म्मणि मैथुने॥

The following is the translation of the text according to the interpretation put upon it by Raghunandana.

"For the nuptial and holy union of a twice born man she is eligible.

Prohibited grees of arriage.

"1. Who is not the daughter of one who is of the same gotra with the bridegroom's father or maternal grandfather.

"2. Who is not a Sapinda of the bridegroom's father or maternal grandfather."

2. With reference to this text it is to be observed that it applies only to the twice born. Sudras have no gotra of their own, and the first part of the rule cannot apply to them. But the second of the two rules applies to Sudras on the authority of Bhabishya Puran.

समानगोत्र प्रवरां शूद्रामूढ़ा न दोषभाक्।
शूद्रस्याशूद्रजातौ तु सपिण्डे दोषभाग् भवेत्॥

3. The following text as to Sapinda relationship applies to all classes—twice born or Sudra.

पञ्चमात् सप्तमादूर्द्ध्वं मातृतः पितृतः क्रमात्।
सपिण्डता निवर्त्तेत सर्व्ववर्णेष्वयं विधिः॥

[It is a general rule applicable to all castes that the Sapinda relationship ceases after the fifth and seventh degree from the mother and father respectively.]

This is the sense in which the term is taken by the Bengal Pundits, in matters relating to marriage only. For purposes of mourning and inheritance, the term has different meanings according to the Bengal lawyers.

Sapinda relationship according to Vijnaneshwar'.

4. According to Vijnaneshwar, the descendants of a common ancestor within seven and five degrees are all Sapindas. If the word *pinda* be taken to mean 'body' then the meaning assigned to the term Sapinda, in the Mitakshara, follows from its etymology. According to Vijnaneshwar, the text last quoted, defines the limit of Sapindaship which would otherwise embrace all mankind.

5. In order to determine whether a girl is eligible for marriage or not, it is necessary according to the Mitakshara, to enquire—

(1) Whether she is a Sagotra or not;
(2) Whether she is within seven degrees from a common ancestor on the paternal side;
(3) Whether she is within five degrees from a common ancestor, on the maternal side, of the bridegroom himself or of his paternal ancestors.

The word Sapinda has three different meanings according to Raghunanda

6. Rahgunandana does not accept Vijnaneshar's definition of Sapinda relation. According to the founder of the Nadiya school, the term Sapinda has technical meanings which have no connection whatever with its etymology. The definition of the term Sapinda for purposes of mourning is contained in the following sloka of Matsya Puran—

लेपभाजश्चतुर्थाद्याः पित्राद्याः पिण्डभागिनः ।
पिण्डदः सप्तमस्तेषां सापिण्ड्यं साप्तपौरुषं ॥

The paternal great-great-grandfather and the two ancestors above him who share the *lepa;* the father, grandfather, and great-grandfather who share the *pinda;* the giver of pinda who is the seventh person. These are all Sapindas. The Sapinda relationship covers seven degrees (in ascent and descent.)

This is the definition of Sapindaship for purposes of mourning. In marriage, the maternal relations are also regarded as Sapindas, according to the text quoted above. The maternal relations of paternal ancestors are not regarded as Sapindas by the Bengal lawyers.

7. If Vijnaneshwar's definition of Sapindaship be

accepted, then marriage becomes almost impossible especially among the Kulin Brahmins of Bengal to which class Raghunanda belonged According to Vijnaneshwar's view of Sapindaship, daughters in the line of grandfather's maternal grandfather and those in the line of great-grandfather's maternal grandfather would be excluded, if within certain limits. Now in this country people generally know who their agnates are. But very few know even the names of the maternal ancestors of their remote paternal ancestors. If Vijnaneshwar's views on the subject be accepted, then it would be simply impossible to be assured that the girl to be married is not within prohibited degrees.

Objections against Vijnaneshwar's definition.

Meaning of the word Sapinda in matters relating to mourning and in common language.

8. In common parlance, no one is called Sapinda who is not an agnate. In fact those only are, in common language, called Sapinda who are within seven degrees from a common paternal ancestor in unbroken line of male descent. According to the following text of Sankha quoted in the Sudhitatwa none but agnates can be Sapindas—

सपिण्डता तु सर्व्वेषां गोत्रतः साप्तपौरुषी ।

9. This definition is accepted by the Bengal authorities for purposes of mourning.

Meaning of the word Sapinda in matter relating to inheritance.

10. In treatises on the law of Inheritance the word Sapinda is defined so as to include cognates Raghunandan follows Jimutavahana, in matters relating to inheritance. Jimuta has shewn that so far as inheritance is concerned Sapindaship extends over only three generations in ascent and descent. Vijnaneshwar takes the word *pinda* to mean 'body;' and according to him the descendants of a common ancestor within seven degrees and five degrees are all Sapindas, the limitation being created by texts. Jimutavahana takes the word *pinda* to mean Parvana oblation; and according to only those are Sapindas to a person who are related to through the Parvana Pinda. As the Parvana Pinda is given to the three immediate paternal and maternal ancestors, Sapindaship according to Jimutavahana over three degrees in ascent and descent, and inclu cognates as well as agnates Jimuta uses the same to bear different meanings in relation to diffent According to the principles recognized in Hindu ju prudence, Jimuta's interpretations cannot be acc

unless there is clear authority. But it is accepted by the Bengal pandits; and it is not necessary to enquire whether it is open to exception or not.

11. Vijnaneshwar's definition has this recommendation, that it applies everywhere without variation. But it is open to objection, on other grounds, as shown already.

In matters relating to marriage.

12. The Bengal pandits use the term in three different senses. According to the technical sense of the term as accepted by Raghunandana, in matters relating to marriage, daughters of agnates of the maternal grandfather are excluded on account of being his Sagotra and also by the texts which declares that Sapindaship ceases after the fifth degree on the mother's side. Daughters of female children of the paternal and maternal ancestors are excluded if within prescribed degrees, but their exclusion is to be regarded as based on special texts, as well as on account of their being Sapindas for the purpose of marriage Girls in the father's maternal line and mother's maternal line, are excluded by special texts. The result is that girls in the following lines are excluded:

(1) Paternal line however remote;
(2) Mother's paternal line within the limit of Sapinda;
(3) Father's maternal grandfather's line within seven degrees;
(4) Mother's ditto ditto five degrees;

Grandfather's maternal lines not excluded by the Bengal authorities.

13. Thus according to Raghunandana, the daughters of the maternal lines of the remoter paternal ancestors are not excluded. The grandfather's maternal uncle is a Sapinda, according to the Mitakshara But according to the Bengal school he is neither a Sapinda nor a Bandhu; and his daughter may be taken in marriage.

14. As a general rule, girls, within the seventh and fifth degrees in the above lines, are excluded. But a girl, within those degrees, may be taken in marriage, if removed by three gotras For the Matsya Puran says—

सन्निकर्षेपि कर्त्तव्यं त्रिगोत्रात् परतो यदि ॥

Thus the great-great-granddaughter, in unbroken line of female descent, of any paternal or maternal ancestor may be taken in marriage.

15. It is also to be mentioned here, that girls in the sixth or seventh degrees in the paternal lines, and in the

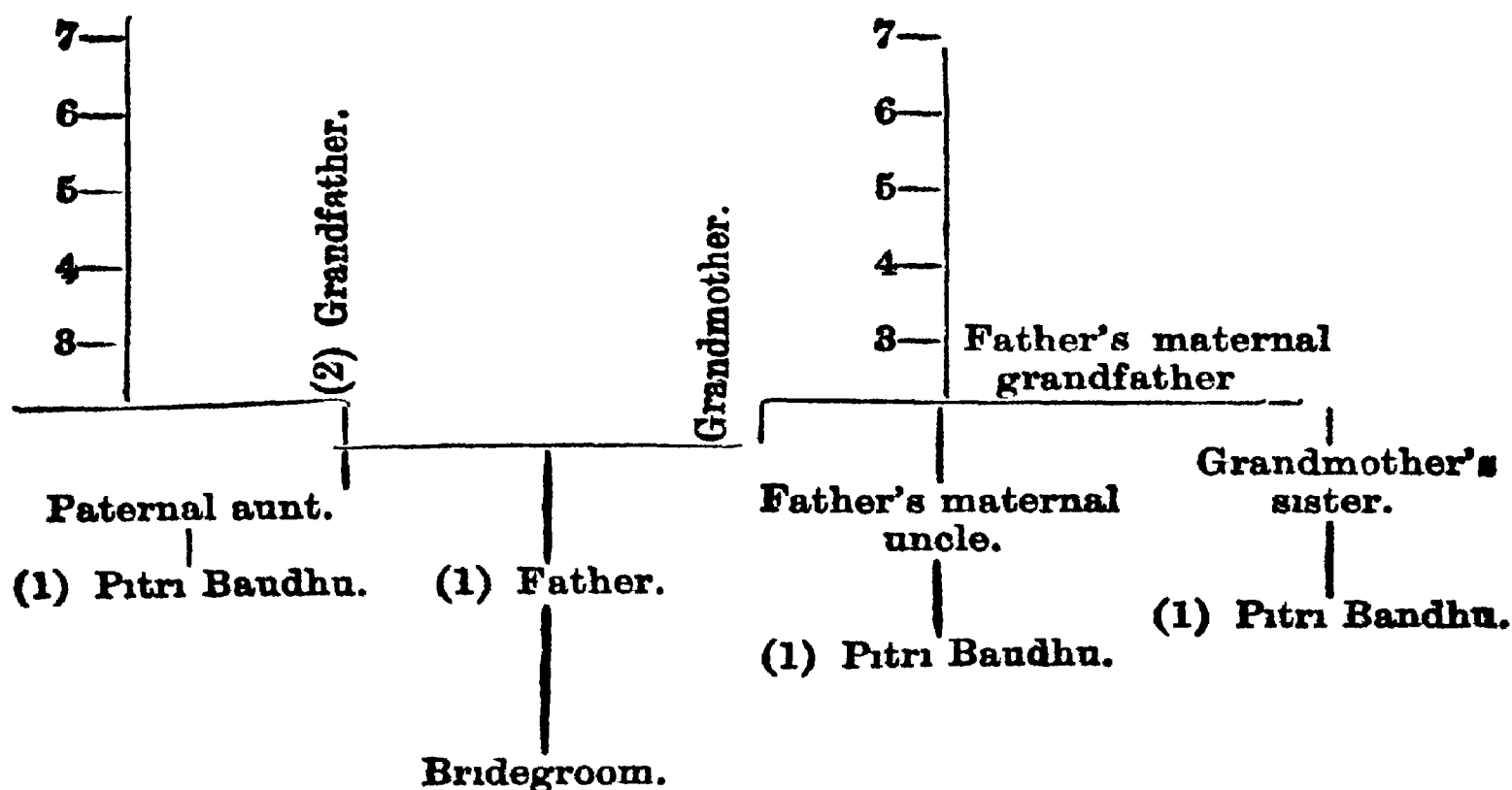
fourth and fifth degrees in the maternal lines are taken in marriage. Such marriage, according to Shulpani, is allowable in the Asura form or among the Kshatrias. For Paithinasi says—

असमानार्षेयीं कन्यां वरयेत् ; पञ्च मातृतः परिहरेत् ; सप्त पितृतः ; त्रीन्मातृतः परिहरेत् पञ्च पितृतो वा ।

16. According to Raghunandana, however, the marriage of a girl, in the sixth or seventh degree on the father's side, and in the fourth or fifth degree on the maternal side, is absolutely void But as such marriage actually takes place very often, and as the authority of Shulpani in Bengal is as great as that of Raghunandan the Courts of law cannot hold such marriage to be illegal or void.

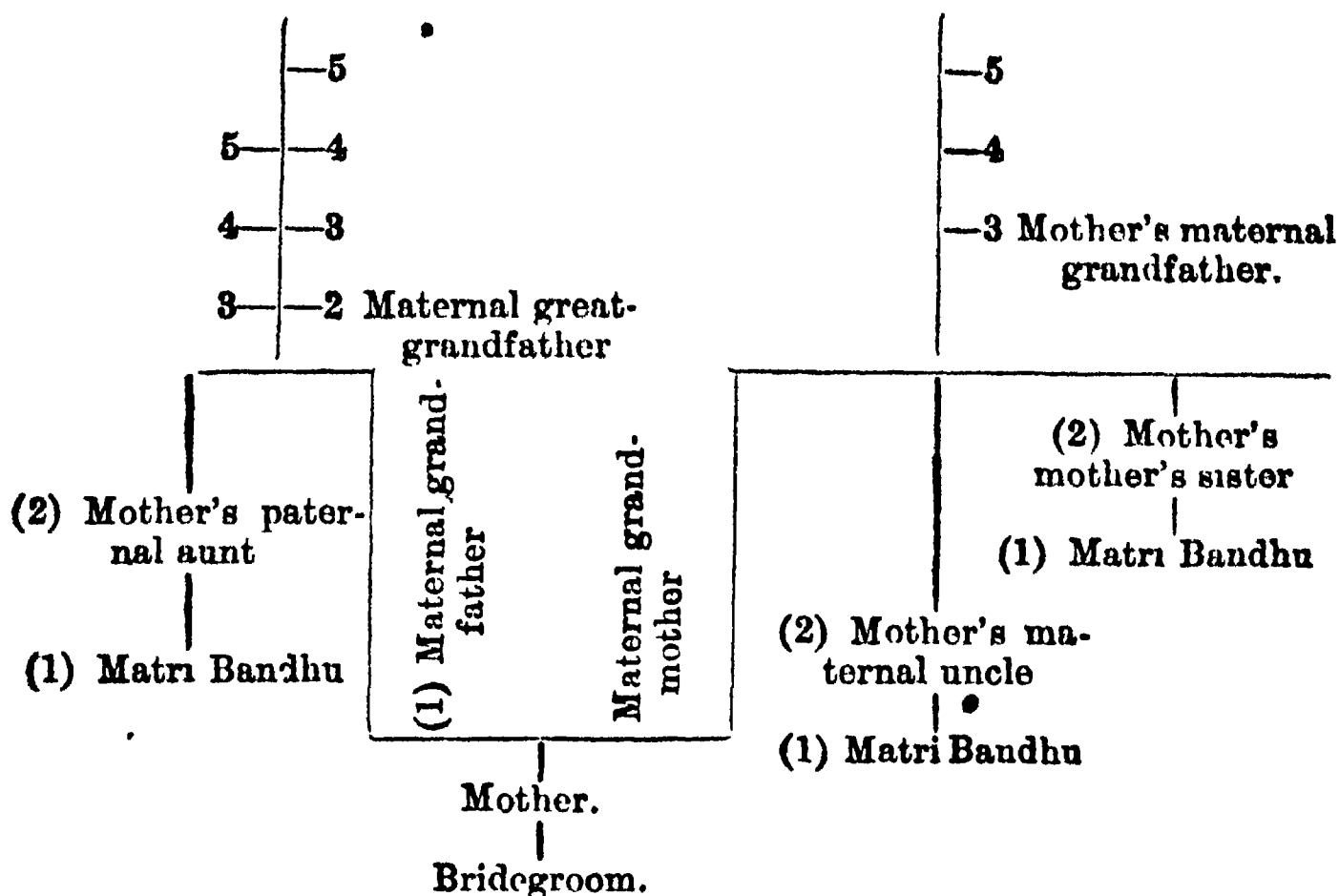
17. The subjoined diagrams show, at one view, the prohibited degrees of relationship according to the Bengal School.

No. I.

PATERNAL LINE, AND THE LINES OF THE PITRI BANDHUS.

N B—The three Pitri Bandhus are the starting points in the calculation of prohibited degrees among cognates In the ascending lines only the descendants of the common ancestors are excluded For example, the paternal aunt's son is a Pitri Bandhu, and his descendants are excluded. But his father is not a Baudhu, and his father's sister may be taken in marriage.

No. II.

MATERNAL LINE, AND THE LINES OF THE MATRI BANDHUS.

N B—The maternal grandfather and the three Matri Bandhus are the starting points in the calculation of prohibited degrees in the maternal lines

18. Marriage within the prohibited degrees is absolutely void. Baudhayana says—

सगोत्रां चेदमत्या उपयच्छेत् मातृवदेनां बिभृयात् ।

[He who inadvertently marries a girl sprung from the same gotra with himself must support her as a mother).

Sumanta says—

पितृस्वसृसुतां मातृस्वसृसुतां मातृसगोत्रां समानार्षेयीः विवाह्य चान्द्रायणं चरेत् ; परित्यज्य चैनां बिभृयात् ।

Marriage within the prohibited degrees is void. But it is not clear whether the girl can be given in marriage again.

He who marries a daughter of his father's sister or of his mother's sister or a girl sprung from the same Gotra with his maternal grandfather or one who is sprung from a family which has the same Pravara must perform the penance known by the name of Chandrayana, and divorcing that wife must support her.

Persons of the same Pravara.

19. From the last quoted text, it would appear that marriage with the daughter of one, who is of the same Pravara, is prohibited. But persons of different Gotra

very seldom happen to have the same Pravara; and the rule is not of much practical importance.

20. In connection with the subject under consideration, it is also to be observed that a step-mother's brother's daughter and grand-daughter cannot be taken in marriage. Sumanta says—

Marriage with step-mother's brother's daughter and grand-daughter prohibited.

सर्व्वाः पितृपत्न्यः मातरः ; तद्भ्रातरोपि मातुलाः ; तद्दुहितरो भगिन्यस्तद-पत्यानि भागिनेयानि ताश्चाविवाह्याः ।

21. There is no text prohibiting marriage with a step-mother's sister. But such marriage never takes place except among the Kulins of Bengal.

No text prohibiting marriage with step mother's sister

22. Marriage with the daughter of a preceptor and of a pupil is prohibited.

Daughter of preceptor and pupil.

23. As the marriage of Hindu widows is legalized by Act XV of 1856 the question arises what are the degrees of kinship within which a widow may not be taken in marriage. According to our Shastars females partake of the Gotra of their husbands from the time of their marriage. For purposes of re-marriage, it is difficult to say whether she should be considered as having the Gotra of her husband or of her father. If it be said that she has the Gotra of her husband until she is re-married, then it would follow that she may be taken in marriage by a Sagotra of her father. The fact is, that the Sagotraship of a female with her father is a visible matter But her Sagotraship with her husband is of a secondary nature created by texts. For purposes of re-marriage the widow must therefore be held to have the Gotra of her father. In that case the question arises whether she can be taken in marriage by any relation of her first husband? In the absence of authority it would not be of much use to work out the details. But it seems to me that the prohibited degrees in respect of a widow may be ascertained by reference to the rules relating to penance and appointment (नियोग) and by reference also to such texts as the following:

Kinsmen whose widows may not be taken in marriage.

मातृष्वसामातुलानि पितृव्यस्त्री पितृष्वसा ।
श्वश्रु पूर्व्वजपत्नीच मातृतुल्या प्रकीर्त्तिता ॥ *

Vrihaspati
(Dayabhaga, Chap. IV, Sec III, para. 31).

* The mother's sister, the paternal and maternal uncles' wife, the father's sister, the mother-in-law, and the wife of an elder brother are pronounced equal to mothers.

सर्वाः पितृपत्न्यः मातरः ।*

24. It may not be out of place to mention here that there are several castes and tribes who have a customary law of their own as to marriage In the Western Presidency there are several castes among whom a brother's children may marry a sister's children By the customary law of Southern India, the prohibition of intermarriage between collaterals is reduced within very narrow limits The only collateral relations that are held prohibited to be taken in marriage by a man are his sister, father's sister, mother's sister, brother's daughter, mother's sister's daughter and father's brother's daughter: but the marriage of a man with his sister's daughter or mother's brother's daughter or father's sister's daughter is usual in all classes even among Brahmins. This laxity in the law of prohibited degrees seems to have been in existence from very early times, and has been noticed by Hindu sages and commentators. Thus Baudhyana, quoted in the Shmriti Chandrika, says, marriage with one's maternal or paternal uncle's daughter is common in the South; and so Brihaspati This custom of the South is also noticed in the Mayukha (Chap I, Sec. I, 13)

Tribal customs.

Among the lower classes of Sudras, marriage with females who have lived in concubinage is allowed in some places.

Some of the aboriginal castes openly practise polyandry. Thus among the Tottiyars (a Telegu caste) it is customary with women after marriage to cohabit with their husband's brothers and near relatives. So the Kallars of the Madura District allow a woman to have simultaneously several husbands.

Section VI.

MARRIAGE, HOW EFFECTED.

1. The formal celebration of marriage is preceded very often by a regular contract of betrothal. The betrothal is not an essential ceremony; and in many families it is omitted altogether. Though betrothment does not constitute marriage, yet some degree of blame attaches to

Nature and effect of the contract of betrothal.

---

* All the wives of the father are like mothers.

the giving and taking of a girl who is betrothed to another person The more orthodox persons therefore refuse to commit themselves before the proper time. With regard to the nature of the contract of betrothal and its legal effect the following is quoted from Dr Guru Das Banerjea's Marriage and Stridhun.

"The betrothment" says Dr Banerjea "generally precedes marriage, but is not a necessary part of the nuptial rite. Betrothment is a promise to give a girl in marriage. It is called vagdan or gift by word, as distinguished from gift by actual delivery of the bride; and its form is that of a promise by the father or other guardian of the bride in favour of the bridegroom, to give him the bride in marriage After betrothal, and separated from it by a variable interval, there comes the marriage ceremony."

"Regarding the legal effects of betrothment there is some difference of opinion Some hold that betrothment constitutes marriage; and it has been accordingly sometimes contended that it is irrevocable, and that a suit would lie to compel specific performance * But the more correct view is that which regards betrothment as a revocable promise of marriage, though revocation would be improper if without a just cause; and this is the view which is in conformity with actual practice, and has received judicial sanction."†

Specific performance of contract of betrothal not decreed.

2. There was formerly some doubt as to whether specific performance of a contract of betrothal can be enforced by a suit. But the point has been now settled by the Legislature, in accordance with the ruling cited above. It has been provided by the Specific Relief Act (Act I of 1877) sec. 21, clause B as explained by the illustrations, that a contract of betrothal cannot be specifically enforced.

Damages decreed.

3. But, though specific performance cannot be enforced, the party injured by the breach of a contract of betrothal is entitled to recover compensation for any pecuniary damages that might have been sustained, and also for any injury to character or prospects in life which may naturally arise in the usual course of things from such breach (Act IX of 1872, sec. 79; Shaik Bhugun *v.* Shaik Rumjan, 24 W. R. 380)

---

* Umed Kika *v* Nogindas Narotamdas, 7 Bomb 122

† In the matter of Gunpat Narain Sing, I L R. 1 Cal 74.

4. Contracts in restraint of marriage, such for example, as that by which Bhisma bound himself to a life of celibacy for the sake of his father, are void under sec. 26 of the Contract Act But a contract of betrothal is not a contract in restraint of marriage On the contrary each party being restrained from marrying any one except the other, the restraint virtually operates in furtherance of the marriage of both.

Contracts in restraint of marriage.

SECTION VII.

FORMS OF MARRIAGE.

1. Hindu lawyers recognize eight different forms of marriage, which are as follow:

The forms of marriage recognised in the Shastras

The approved forms.	*The disapproved forms.*
1. Brahmo.	5. Gandharva.
2. Daiva.	6 Rakshasha.
3. Arshya.	7. Ashura.
4. Prajapatya.	8. Paishacha.

Of these the Brahmo form alone prevails in the higher classes of the Hindu community. The other forms, though not altogether obsolete, exist only in certain localities as tribal customs. Persons in indigent circumstances sometimes take money from the bridegroom privately. But the marriage is celebrated in the Brahmo form.

2. The following texts of Manu enumerate and define the eight forms of marriage mentioned above.

१। ब्राह्म { आच्छाद्य चार्चयित्वा च श्रुतशीलवते स्वय ।
आहूय दानं कन्यायाः ब्राह्मो धर्मः प्रकीर्त्तितः॥ }

२। दैव { यज्ञे तु वितते सम्यग् ऋत्विजे कर्म्मकुर्व्वते ।
अलङ्कृत्य सुतादानं दैवं धर्म्मं प्रचक्षते ॥ }

३। आर्ष { एकं गोमिथुनं द्वे वा वरादादाय धर्म्मतः ।
कन्याप्रदानं विधिवदार्षो धर्म्मः स उच्यते ॥ }

४। प्रजापत्य { सहोभौ चरतां धर्म्ममिति वाचानुभाष्य च ।
कन्याप्रदानमभ्यर्च्च्य प्राजापत्यो विधिः स्मृतः ॥ }

५। आसुर { ज्ञातिभ्यो द्रविणं दत्त्वा कन्यायै चैव शक्तितः।
कन्याप्रदानं स्वाच्छन्द्यादासुरो धर्म उच्यते॥

६। गान्धर्व { इच्छयान्योन्यसंयोगः कन्यायाश्च वरस्य च।
गान्धर्वः स तु विज्ञेयो मैथुन्यः कामसम्भवः॥

७। राक्षस { हत्वा छित्त्वा च भित्त्वा च क्रोशन्तीं रुदतीं गृहात्।
प्रसह्य कन्याहरणं राक्षसो विधिरुच्यते।

८। पैशाच { सुप्तां मत्तां प्रमत्तां वा रहो यत्रोपगच्छति।
स पापिष्ठो विवाहानां पैशाचश्चाष्टमोऽधमः॥

(Manu, chap. III, verses 22-

3. As already stated, it is highly probable that, the primitive state, marriage took place by force, fr or purchase. This view is confirmed by going throu the texts quoted above. With the exception of the th forms, particularly recommended by the Brahmin la yers, for the benefit of their own class, all the other fo are based on purchase, enticement or force. The Brah Daiva, and the Prajapatya forms were evidently inven by the sages for encouraging learning and piety T forms which they found actually prevailing are Ars Gandharva, Ashura Rakshasha and Paishacha

Forms of marriage devised by the Brahmins

Modes by which marital dominion was usually acquired.

Arsha.

4. The Arsha form is one of the primitive kind, as very name indicates. In this form, the father gave daughter, in consideration of receiving a pair or two bullocks from the bridegroom This was the form wh evidently prevailed at the time when the cattle which a m possessed formed the most important part of his weal With the change which took place in the material con tion of society, this form became obsolete.

Ashura.

5. The Ashura form is the same as the Arsha, the o difference being that the form is called Ashura, if any otl property than cattle is taken by the father of the bri This form practically exists even at the present da though the marriage is celebrated in the Brah form even where money is taken. This form is cal Ashura probably on account of its prevailing among aboriginal tribes.

6. It has been held that among the lower castes presumption is, that marriage is celebrated in the Ash form. (Vijai Rangam *v.* Laksman, 8 Bomb. 244)

7. In the same case it was also held that the giving of *palu* or present of money to the bride does not render the marriage an Ashura one.

Gandharva

8. "The reciprocal connection of a youth and a damsel, with mutual desire, is the marriage denominated *Gandharva* contracted for the purpose of amorous embraces, and proceeding from sexual inclination" This is Manu's description of the sixth form of marriage, according to his order of enumeration Though regarded as one of the four base forms of marriage, in consequence of its proceeding from sexual inclination, it is permitted to the military class, and actually prevails to a certain extent among the Rajas and Chiefs of the Kshatriya caste. This form of marriage resembles marriage by courtship which prevails in Europe.

Rakshasa.

9. "The seizure of a maiden by force from her house while she weeps and calls for assistance after her kinsmen and friends have been slain in battle or wounded, and their houses broken open, is the marriage styled Rakshasa. This form is not only condemned in the Shastars, but is punishable under the Indian Penal Code, sec. 366. It has long since become obsolete. But the outward form is still observed among certain tribes as, for instance, the Khonds of Orissa. Among the Meenas, a robber tribe in Central India, the Rakshasa form of marriage exists, not as a symbol, but as a matter of real earnest, as real as any other form of robbery.

Paishacha

10. The Paishacha is no marriage at all It is strongly condemned by the sages And it has practically become obsolete.

Brahmo.

11. The only forms of marriage which now prevail in Hindu society are the Brahmo and the Ashura. The Brahmo form was recommended by the sages evidently for the purpose of encouraging learning. In the Brahmo form, the girl is to be decked with clothes and ornaments, and given as a free gift to a student of the Vedas, without any solicitation on his part. The father is to consider that he is honoured, if his daughter is accepted. So strongly is this form of marriage recommended, that it has superseded almost all the other forms.

Prajapa

12. The Prajapatya differs from the Brahmo only in this that in the former form, the proposal is made first by the party of the bridegroom. In actual practice, the Brahmo form is observed even where the proposal first comes from the bridegroom.

Daiva.

13. The Daiva form has become obsolete, if it ever existed. It seems quite possible that this form, though recommended by the sages to a certain extent, never found favour with the people. The priest who performs a sacrifice is generally an old man, and of an inferior position in society. The learned pandits very seldom perform the work of priests; and the duty is generally assigned to persons who do not hold a very high rank among scholars. Whatever be the cause, the Daiva form does not seem to have been ever prevalent.

14. Among the aboriginal tribes the form of marriage is, in some cases, altogether different from any recognized in the Hindu Shastars.

Form of marriage among aboriginal tribes.

15. Among some of the agricultural tribes in Assam, the interchange of the *pan* leaf, by the husband and the wife, constitutes marriage.

Koch.

16. Among the Koch, marriage is settled by the mothers, when the parties are young; and widows are permitted to marry.

Santhal.

17. Among the Santhals, boys and girls are very seldom married before the age of fifteen. Young men and maidens freely mix with one another, and freedom of selection is allowed to the parties, though it is considered more respectable, if the match is settled by their parents or guardians. A price (generally five Rupees) is paid for the bride; and the essential part of the marriage ceremony consists in the Sindurdan or the painting of the bride's brow with vermillion, and the social meal which the bridegroom and the bride eat together. The Santhal very seldom marries more than one wife. Divorce is not common, and is allowed only with the consent of the husband's clansmen.

The Kisans, Bhuiyas, &c. of Chutia Nagpore.

18. Among the Kisans, Bhuiyas and the Hos of Chutia Nagpore, persons are not married until they attain maturity. With the Hos drinking beer together constitutes the chief nuptial rite. Among some of the Chutia tribes re-marriage of widows is allowed, and the practice of taking to wife, in the Sagai form, an elder brother's widow is common (Radaik Ghaserain *v.* Budaik Pershad Sing, Marsh 644).

Kurmis.

19. The Kurmis, in some places, as in Singbhoom observe the singular practice of making the married pair mark each other with blood drawn from their little fingers.

Jats.

20. Among the Jats in the North Western Provinces the marriage of a widow with the younger brother of her husband is common; and the children born of such marriage are entitled to inherit their father's estate equally with other sons. Poorun Mall *v.* Toolsee Ram, 5 N. W. P.

The Lower castes in Western India.

21. In the Presidency of Bombay, the customary law of marriage allows divorce under certain circumstances. Re-marriage of widows and divorced wives also prevails there among the inferior castes. The second marriage of a female is called *Pat* by the Maharattas, and *Natra* in Guzrat.

22. The ceremonies of *pat* or re-marriage, are different from those of marriage The re-marriage of a wife is considered less honourable than that of a widow. Women, whether wives or widows, become lowered in social position by re-marriage, and are excluded from preparing food at sacrifices, and from being present at marriages.

Malaber.

23. In Malaber country, females go through a form of marriage, the bridegroom not necessarily taking the position of husband. After maturity they may consort with whom they please, and with as many as they please, provided that the connexion be with members of their own or some higher caste. In consequence of this promiscuous cohabitation, parentage is not generally ascertainable in the male line; and inheritance runs therefore in the female line. The children of a man are not his heirs; his sisters, sister's children, and others related to him in the maternal line succeed to his estate.

24. Under a system so singular, the family group must necessarily be of a type different from the ordinary one. It is termed a *tarwad* of which the remotest kindred is acknowledged to be a member, if living under the authority of the head of the family, and taking part in its religious observances. The eldest male member of whatsoever branch, is the head of the *tarwad*, and is termed the Karnaven, and the other members are called Anandraven. The *Karnaven* has entire control over the affairs and the property of the family, and no member has the right to enforce partition of his share of the family property. The guardianship of children under the Malaber law belongs to their Karnaven and not to their father (Thatha Baputty *v.* Chakayatha Chatha, 7 Mad. p. 179).

25. In a system of promiscuous intercourse like that in Malaber, the ordinary state of widowhood is necessarily unknown. The position of the female is not affected by her connection with the members of the other sex. Whether so allied or not, she continues alike a member of her family, and lives under the tarwad roof.

Custom in Canara.

26. The law of Canara called the *Alya Santana* law is similar to that of Malaber, with only this difference, that the management of property vests generally in females in Canara, and not in males as in Malaber (Munda Chetti *v.* Timmaju Hensu, 1 Mad. 383).

27. As a general rule the law of the Shastars is observed in practice by the Hindus throughout the country. It is only among certain inferior castes, and among certain aboriginal tribes, that the customary law which actually prevails is different from the law of the Shastars. These tribes and castes have no written Codes of their own; and their general tendency is to adopt Hindu law, as will appear from the fact that even where widow marriage prevails it is considered less honourable.

Marriage among Vairagis.

Among the Vairagis marriage takes place usually without any ceremonies prescribed by the Shastars. The remarriage of widows also takes place among them; and people of low castes generally turn Vairagis in order to marry widows.

Section VIII.

MARRIAGE CEREMONIES.

The ceremonies usually observed in celebrating marriage by Hindus.

1. It has been already stated that marriage among the Hindus, at the present time, is generally celebrated in the Brahmo form, even where a nuptial gratuity is taken by the bride's family. The rites differ in their details according to local or family usage. The most common forms are given in the compendia of Ram Datta, Bhavadeva, Pasupati. A brief account of the leading features of the ceremony may not be out of place here.

Vridhi Shradha.

2. On the forenoon of the day of gift, the *nandimukh* or *vridhi sradha* is performed by the father or other kinsman of the bride and bridegroom in their respective houses. It is the ordinary *Parvana sradha*, and is performed on this, as on other sacramental occasions, under the name of Vridhi Sradh, with a view to render the sacrament auspicious by the blessing of departed progenitors.

The bridegroom goes in state to the house of the bride.

3. In the evening the bridegroom comes in procession to the bride's house, and is there received with every mark of hospitality. The bridegroom sits in state on a *gadee* for about half an hour. The assembled guests, friends and relations of the parties sit round him as in a Darbar. Learned Brahmins and their pupils discuss the Shastars. After awhile the bridegroom is taken to the altar where the ceremonies of Baran and Sampradan or first gift takes place.

The Darbar.

The formal welcome by the bride's father.

4. The Baran ceremony consists in giving the bridegroom *padya* or water for washing the feet, Arghya or water mixed with flowers, grass and sandal paste, a stool or cushion to sit upon, and Madhuparkya or mixture of honey, curds and butter each giving and taking being being accompanied with the chaunting of set formulæ.

The formal welcome by the females of the family.

5 The bridegroom is then taken to the inner apartments in order to have honours and benedictions from the matrons, and also for the performance of certain ceremonies known as Stree Achar, not recognized in the Shastars. The essential part of the Stree Achar is the Satpak. The husband stands on a piece of stone; and the bride is carried on a board seven times round him.

Satpak.

The gift of the bride by her father or other guardian.

6. After these preliminary ceremonies, the bride and bridegroom are again brought before the altar; and the bride is then formally given to the bridegroom by her father or other guardian. The bridegroom then recites the following text which is called कामस्तुतिः—ॐ क इदं कस्मा अदात्; कामः कामायादात्, कामोदाता कामः प्रतिग्रहीता कामः समुद्र-माविवेश; कामेन त्वां प्रतिगृह्णामि; कामैतत्ते

"Who gave her? To whom did he give her? Love gave her. To love he gave her. Love was the giver. Love was the taker. Love has pervaded the ocean. With love I accept her. Love! may this be thine."

7. The giver next presents a piece of gold to the bridegroom to complete the gift according to the Shastars. Household furnitures of all sorts are also given to the bridegroom at the same time, and sometimes land and other property are given also.

8. Marital dominion is acquired by the Sampradana or gift of the bride by her father. The purificatory ceremonies take place after Sampradan, either at once or at sometime within the next four days. The purificatory ceremonies consist primarily of three parts, *viz.*:—

The occult ceremonies.

1. Taking of hand (पाणिग्रहण).
2. Uttara Bibaha or subsequent ceremonies.
3. Final ceremonies.

9. The Panigrahan is commenced by the kindling of the holy fire in the prescribed form. The Panigrahana and Uttara bihaha rites consist of several distinct ceremonies, the most important of which are the following:

1. Panigrahana	1. Oblation of parched rice mixed with the leaves of Sami (लाजहोम) 2. Ascending of the bride on a piece of stone (शिलारोहण) 3. Walking of seven steps (सप्तपदीगमन) 4. Taking of hand (साङ्गुष्ठ-ग्रहण)
2. Uttarbibaha	1. Sitting on the hide of an ox (आनडुहचर्म्मोपवेशन) 2. Shewing the pole star (ध्रुवदर्शन). 3. Shewing the star called Anuradha. 4. Kneeling down of the bride before the bridegroom, the bride announcing herself as being of the Gotra of her husband (पतिगोत्राभिवादन).
3. Final ceremonies	1. (समञ्जनीयचरुहोम) or oblation of charu. 2. The oblation called (धृति होम) 3. (गृहप्रवेश) or entering the house. 4. Getting into the conveyance &c., (यानारोहण चतुर्थ्यामन्न आशभक्षसमाधानाख्यहोम) 5. The Hom prescribed for performance on the fourth day.

10. Though the above ceremonies are prescribed for performance at different times, yet in actual practice, they are performed at once. In all these ceremonies, the bridegroom is the actor. Various mantras are recited along with the several oblations to fire, and other ceremonies. By these mantras, blessings are invoked on the married pair, and the bride is enjoined to do her duties cheerfully.

11. In the case of Sudras who are incompetent to perform the homa or oblation to fire, it is performed through the instrumentality of a Brahmin. This is, in accordance with the opinion of Raghu Nundan, Nanda Pandita, Nilkanta and other authoritative writers.

Necessity

Bride is taken in state to her husband's house where she remains for about 3 days.

12. The bride is conducted in procession to her husband's house on the day next after that in which Sampradan takes place. On arrival there the matrons of the family receive the married pair with due honours. On the next day the ceremony of Pakspaisha usually takes place. The friends and relatives of the husband are invited by him to a feast. While the assembled guests dine, the bride is taken into the midst of the party with a plate containing rice mixed with butter out of which she serves a portion on the plates of each of the several guests. If the bride's father belongs to an inferior family, then the relatives of the bridegroom sometimes refuse to recognize the bride in this formal way. The Phoolsajiya or flower-bed ceremony takes place on the second or third night, after which the bride is taken back to her father's house, where she remains until maturity.

The bride ... house where she remains until maturity.

13. Although the bride is supposed to be given in marriage without any solicitation on the part of the bridegroom, the bride is never sent to her husband's house without solicitation Messengers are sent from the husband's house from time to time in order to induce the parents or guardians of the bride to consent to her being taken. But until maturity all sorts of excuses are held up; and the girl is never sent except for some urgent cause as a marriage or shradh or the illness of a near relative of the husband. If she is taken to her husband's house on such occasions, she is brought back again immediately after the occasion is over. When at length the bride attains maturity, and she can no longer be detained, then the parting finally takes place. But in no

case is the girl sent without solicitation on the part of the husband's guardians.

SECTION IX.

NECESSITY OF CEREMONIES.

Ceremonies absolutely necessary to create the relation of husband and wife.

1. According to the Hindu lawyers marital dominion is acquired by gift of the bride; and by acceptance on the part of the bridegroom. But the relationship of husband and wife is a non-material essence. It cannot be produced by a material cause like gift and acceptance. It can be produced only by the recitation of mantras prescribed in the sacred scriptures. Mantras alone are capable of producing a non-material effect. Accordingly Manu says:—

पाणिग्रहणिका मन्त्रा नियतं दारलक्षणं ।
तेषां निष्ठा तु विज्ञेया विद्वद्भिः सप्तमे पदे ॥

Manu, Chap. VIII, 229.

[The (recitation of) mantras prescribed for the taking of hand, is essential to the creation of the relation of husband and wife; and marriage is completed with the seventh step.]

2. There is no difference of opinion among the Hindu Jurists as to the necessity of mantras and ceremonies, in order to create the relation of husband and wife. The relation being a non material one, it cannot be created otherwise than by mantras. The etymology of the word पत्नी also shews that a wife who is taken in marriage by due observance of ceremonies, can alone be regarded as a lawful wife.

The son born of a wife who is taken in marriage without ceremonies cannot be considered as an Aurasa son.

3. The son of a wife who is taken in marriage without observance of ceremonies cannot be considered as an Aurasa son; for an Aurasa son is one who is begotten of धर्मपत्नी by her husband. Jajnyavalkya says: औरसो धर्मपत्नीजः Katyana says: सवर्णायां संस्कृतायां स्वयमुत्पादितमौरसं विद्यात्. It thus appears that unless the mother has undergone the purifying ceremony of marriage, her son cannot be called Aurasa. Certainly the purification cannot be effected without mantras.

4. It may be urged that the nuptial rites, prescribed in the Shastars, are so cumbrous that an exact compliance with their details is by no means easy; and that if those ceremonies be held necessary, real and *bonâ fide* marriages would stand in danger of being rendered invalid, in consequence of trivial defects of form. But there is no reason whatever for such apprehension. A substantial compliance with the prescribed forms is all that is necessary, in order to render the transaction legally valid. The Chandoga Parishistha says:—

All that is required is substantial compliance.

[Where the essential ceremony is omitted, it must be performed with all formalities again. But if an incidental ceremony is omitted, the whole ceremony need not be performed again; nor is the incidental ceremony, which was omitted at the proper time, to be performed over again.] If it appears that the parties engaged the family priest or any other priest supposed to know the rules and forms prescribed in the Shastars, and if it appears that the parties substantially complied with the directions given by the priest, then the validity of the transaction cannot be vitiated by any accidental error. There are mantras which can remedy any accidental defect in the proceedings; and the priests generally take care to recite these mantras at the end of the ceremony.

5. It has been well observed that "ceremonies which strike the imagination serve to impress upon the mind the force and dignity of the contract." The observance of ceremonies in marriage not only secures publicity, but strengthens the marriage tie, in the eyes of the parties as well as of neighbours. It is also to be borne in mind that the preparation for ceremonies affords time for deliberation, and thus prevents hasty marriages. Questions as to the validity of marriage between Hindus are very seldom raised for adjudication in any Court of Law. This result is due mainly to the observance of those forms and ceremonies which the Hindu legislators and sages prescribed and enforced. It is true that the Brahmin lawyers are benefitted by the observance to a certain extent. But the higher classes of Brahmins very seldom do the work of priests; and it would be doing injustice to the sages to

suppose that they prescribed ceremonies for their own benefit only.

Consummation is not necessary to complete the marriage.

6. The usual ceremonies being observed, marriage becomes complete and irrevocable, and consummation is not necessary to render it valid. There is no distinction in Hindu law between consummation and non-consummation.

The jurisdiction of the Civil Courts to try the validity of marriage.

7. It was at one time doubted whether questions as to the validity of Hindu marriages could be tried in the Courts, irrespective of any question as to right to property. In the case of Anjana Dasi *v.* Praladh Chundra Ghosh,* Mr. Justice Glover, following an early case, held that such questions could not be tried by the Civil Courts; but on appeal this decision was reversed.

SECTION X.

TIME FOR CELEBRATION OF MARRIAGE.

1. The time for celebration of marriage has to be fixed with various astrological considerations. These do affect the validity of the marriage according to some authorities. But in practice marriage sometimes takes place in intercalary months, and at times which are declared as improper.

Whether a valid marriage can take place while the bridegroom is impure on account of the birth or death of a near relative.

2. There is only one question connected with time which has been supposed to have a legal aspect, namely whether marriage solemnized during impurity *(asauch)* of either party, owing to the birth or death of a kinsman, is valid. There can be no doubt that one, under impurity cannot utter the Vedic mantras without which there can be no valid marriage. There is no reported case on this point. But a very similar question arose in the case of Ramalinga *v.* Sadasiva (1 W. R. P. C. 25). In that case it was contended that adoption during impurity is invalid. But the point was not decided, as it was found as a fact that the adoption had taken place after the period of impurity had expired.

3. The question as to the valility of an adoption, during impurity, was at one time hotly discussed among the leading Pandits of Nadiya, with reference to an adoption

---

* 14 W. R. 403.

made by the then Raja of Nadiya. The boy taken in adoption lost his mother soon after his birth; and he was taken, while he was only six months old. The question was raised after the ceremony had taken place. The priest who presided was himself one of the leading Pandits of Nadiya. But he justified himself on the ground that there can be no impurity, unless impurity is accepted. A child of six months cannot accept impurity; and such a child cannot be impure. In that case the adopter was not impure. None of the living Pandits admit now that an adoption or marriage can take place during impurity, for the maxim is—

ग्रुची तत्कालजीवी कर्म्म कुर्य्यात्

Section XI.

GUARDIANSHIP IN MARRIAGE.

1. A female is not regarded in Hindu Law as an active party in marriage. The bride is viewed, in the more approved forms of marriage, as the subject of gift by her father or other guardian. The Shastar authorise Swamvar or selection of husband by the bride herself if she has none to give her in marriage (Jajnyavalkya Chap. I, v. 64). But in actual practice, girls are given in marriage, by their guardians, before puberty; and Swamvar may be said to be obsolete.

Shastars allow Swa var or sele tion of bri groom by bride. In pract Swamvar obsolete.

2. As the marriage of girls takes place while they are yet infants, the father or other guardian has to select the bridegroom and also to preside at the ceremony. The order in which the right to guardianship vests is given somewhat differently by different sages. Yajnyavalkya says:—

Who c be guard in marri

पिता पितामहो भ्राता सकुल्यो जननी तथा ।
कन्याप्रदः पूर्व्वनाशे प्रकृतिस्थः परः परः ॥

[The father, paternal grandfather, brother, kinsman, and mother being of sound mind are the persons to give away a damsel.]

3. This order is accepted in the Mitakshara, and is the law all over India, except Bengal.

The la the subj accordi the Mit shara.

4. Of the other sages, Narada says :—

पिता दद्यात् स्वयं कन्यां भ्राता वानुमतः पितुः ।
मातामहो मातुलश्च सकुल्यो बान्धव स्तथा ॥
माता त्वभावे सर्व्वेषां प्रकृतौ यदि वर्त्तते ।
तस्यामप्रकृतिस्थायां कन्यां दद्युः सजातयः ॥

[The father himself will give the daughter (in marriage) or her brother by the father's consent; the maternal grandfather, the maternal uncle, the Sakulya and Bandhus. The mother in default of all these; provided she be of sound understanding, otherwise the members of the caste will give the daughter in marriage].

Vishnu says—

पिता पितामहो भ्राता सकुल्यो मातामहो माताचेति
कन्याप्रदः पूर्व्वाभावे प्रकृतिस्थः परः परः

[The father, paternal grandfather, brother, Sakulya maternal grandfather, and mother are the givers of a damsel; in default of the first, the next in order, if in the natural state of mind.]

Raghu-nanda.

5. By reconciling all these texts, Raghunandana has laid down that the persons entitled to give a girl in marriage are the father, paternal grandfather, brother, Sakulya maternal grandfather, maternal uncle and mother if of sound mind.

6. It will be seen that the order of guardianship in marriage differs from the order of guardianship for other purposes. A very inferior position is assigned to the mother in the order of guardians for marriage, though for other purposes, she is only next to the father. The Supreme Court of Calcutta, accordingly, held in the case of Janaki Pershad Agarwala, that the brother was the person entitled to give a girl in marriage in preference to the mother. But in a recent case, the text of Yajnyavalkya has received a construction which, to some extent, reconciles it, with the natural rights of the mother. In that case, the plaintiff, a divided brother of the defendant's deceased husband, claimed an exclusive right to give in betrothal the infant daughter of his deceased brother, and to have a sum of money paid to him by the defendant for the expenses of the marriage. The High Court of Madras in deciding against the plaintiff appellant observ-

ed "Upon reason and principle, and the application of the existing law, in regard to the independent position of the defendant, both as guardian and proprietor of the estate derived from her husband, we come to the conclusion that the law does not warrant a declaration of the absolute right set up by the plaintiff We are of opinion that the duty was enjoined on the husband's kinsmen in order to ensure the making of a suitable provision for the betrothal of daughters before reaching the age of puberty. If, on a choice being made of a person in every way suitable to be affianced, a mother, without sufficient cause, improperly refused to accept him, and obstructed the betrothal, a suit to compel her to allow the ceremony to take place, and if she was chargeable, to provide for its celebration, would probably be successful. But no Court, we think, would be justified in granting such relief, if the mother's refusal and resistance were because of serious objections to the person chosen. Nor, we think, would the betrothal of a daughter with an unobjectionable person of the mother's selection be restrained at the suit of the brother or other kinsmen of the father who had been consulted by the mother, and had, without sufficient cause, objected to the betrothal. It would seem from the express provision made by the law for the choice of a husband by the girl herself, in case of neglect on the part of her relatives, that the duty does not amount to an enforceable legal obligation, and the effect of restraining the betrothal in such a case would probably be to aid in thwarting betrothal before puberty, the very purpose for which the duty was enjoined. (Nama Sivyam Pillai *v.* Annamai Umal, 4 Mad. 339.)

In the case reported in 8 I. L. R. p. 266 the paternal uncle of a girl sought to restrain her mother from giving her in marriage, and also prayed for having the custody of the minor in order to dispose of her in marriage with a bridegroom of his own selection. It was held that the petitioner was entitled to the relief which he asked under Act IX of 1881 (Bromo Maya *v.* Kashi Chundra, 8 I. L. R., Cal. p. 266.)

Step-mother cannot be a guardian in marriage.

7. It has been held in the case of Ram Bunsee Koonwara *v.* Soobh Koomaree (7 W. R. 321) that the word 'mother' in the texts does not include step-mother.

8. It was also held in that case that where, as in the

instance of Sakulyas, the order of guardianship is not definitely laid down, the Court has the discretion to select a proper person as guardian, and in the exercise of this discretion, the Court held that the paternal grandmother of a girl was preferable to her step-mother as her guardian in marriage.

Among Kulins the mother may give a daughter in marriage even though the father be living.

9. It has been held that a Kulin Brahmin, who has many wives, and visits the mother of the daughter after long intervals of absence during which she continues under the guardianship of her mother, is not such a natural guardian of that daughter as her mother (Madhu Soodan Mookerjea *v.* Jadub Chandra Banerjea, 3 W. R. 194).

10. This ruling seems to be laid down too broadly. But the actual decision of the case did not go further than laying down that if the mother has already given the daughter to a suitable bridegroom, such marriage cannot be declared void on account of any objection which the father may subsequently raise. As the daughter has the power of Swamvar, if no one gives her in marriage before maturity, the actual decision in the case of Madhu Sudan *v* Jadub Chandra is unexceptionable.

Forfeiture of the right to give.

11. From the texts which make it incumbent on the father to give his daughter in marriage before maturity, and from the law as to Swamvar, it follows :—

1. That the power which the father possesses is more of the nature of a duty than a right.
2. That the father may forfeit the right by failing to discharge the duty in accordance with law.

12. Although there are some conflicting texts, yet the modern Hindu Jurists are agreed that the father has no absolute dominion over his children, as over goods and chattel. It is said that the father has the right to give his daughter in marriage. But as no gift can be made of that which is not property, the word gift, in reference to the marriage of a daughter, must be held to be used in a secondary sense. Properly speaking, the right of the father in the matter, consists in his power to select the bridegroom, and to preside in the ceremony. So far as other people are concerned, it is a right. But so far as the daughter is concerned, it is a duty. While the

daughter is yet a minor, she must submit to the will of the father or other guardian. But neither the father nor any other guardian can have the right to dispose of her in a manner not warranted by law. In the Asura form of marriage which is lawful for Sudras, a Sudra father may take money from the bridegroom. But if, for the sake of money, he be about to give the girl to one who can by no means be considered as a suitable bridegroom, then I conceive the father forfeits his right, and the next in order of guardianship may sue to prevent the match from taking place. There is no direct ruling or authority on the point. But considering the abuse which is sometimes made by Hindu fathers, it is much to be desired that the Courts of law should interfere, where it is absolutely necessary to do so in the interest of the child. The Kulins of Bengal and persons in indigent circumstances sometimes give their little daughters to decrepit octogenarians. The influence of public opinion has done its utmost; but the evil will not be rooted out of the country, without the interference of the Courts. The law of the Shastars seems to be clear enough. There is no reason why the Courts should refuse to exercise their jurisdiction in the matter.

13. It has been held that if a marriage is brought about by fraud or force, without the consent of the natural guardian, then such marriage may be declared void by the Courts (Anjana Dasi *v.* Pralhad Ghose, 14 W. R. 403.) But a marriage by force may be regarded as a Rakshasa marriage and need not be necessarily void. Whether a suit for damages lies for infringement of right to give in marriage, is a question on which there is no direct ruling.

14. A guardian may delegate his authority to another (Golamee Gopi Ghose *v.* Jogeshwar Ghose, 3 W. R. 193.)

Section XII.

RIGHTS OF HUSBAND AND WIFE OVER EACH OTHER'S PERSON.

1. It follows from the very nature of the matrimonial relation, that the husband and wife must be entitled to

the society of each other. It is one of the express conditions in the nuptial vow, that each should be the associate of the other; and the sages denounce the desertion or neglect of either party by the other as punishable in this world and in the next. While the wife is directed to be obedient to her lord, the husband is likewise required to honour a virtuous and loving wife.

Marital rights are determined by law and not by contract.

2. The rights which the husband and the wife acquire over each other's person by marriage are regulated and defined by law. The legal consequences which flow from marriage cannot be avoided or modified by contract. Manu says:—

न निष्क्रयविसर्गाभ्यां भर्तुर्भार्या विमुच्यते।

[Neither by sale nor by desertion can a wife be released from her husband.] Following the spirit of this rule, the High Court of Bengal held in the case of Sitaram v. Ahire Heranee (20 W. R. 49) that "it is contrary to the policy of the law to allow persons by a contract between themselves to avoid a marriage on the happening of an event they may think fit to fix upon." The event in that case was the husband's ceasing to live in the wife's paternal village.

Parties may desert each other under certain circumstances. But the relationship is never dissolved.

3. Although, under certain circumstances Hindu law allows either party to desert the other, yet the text of Manu quoted above shows, that neither by sale nor by desertion is the relationship dissolved altogether. Even death does not destroy the connection. Even after the death of one of the parties, the survivor is required to perform the funeral obsequies, and to give oblations of food and libations of water to the deceased. Even if there be a son, still the survivor of the married pair, is required to give libations of water to the deceased. These facts show that the connection created by marriage is not dissolved even by death. When both the parties are dead, they are supposed to eat together the Pindas offered to them by their sons, grandsons, &c.

4. Under the Hindu law, as indeed under most other systems, the liberty of the wife is liable to be considerably restrained by the husband. The duty of attendance on her husband which is so strongly inculcated, obliges her to follow him wherever he chooses to reside. A Hindu husband would not be punishable under the Pe

Code (sec. 339) for exercising restraint on his wife, for the wife can have no right to go wherever she chooses without the consent of the husband.

5. Though there are some texts which authorize the chastisement of a wife to a slight extent, yet the authority of those texts is more than counterbalanced by others which require that women should be honoured as goddesses. The beating of a wife is strongly condemned by public opinion, and as it is generally believed, that the beating of a wife brings on poverty, it is very rarely practised. A husband who beats his wife is punishable under the Indian Penal Code.

The husband is the lawful guardian of a wife who is under age.

6. The custody of an infant wife belongs, as a rule, not to her parents but to her husband. Yajnavalkya says :—

रक्षेत् कन्यां पिता, विन्नां पतिः, पुत्रास्तु वार्द्धके ॥

Yajnavalkya I, 85.

[The father protects the unmarried damsel, the husband protects her after marriage, her sons protect her in old age.]

By the custom of the country, a child wife may remain in her father's house until maturity.

7. In the case of Kati Ram Dookhanee *v.* Musamat Gendhinee (23 W. R. 178) Mr. Justice Markby observed, "The marriage of an infant being under Hindu law legal and complete marriage, the husband, in my opinion, has the same right, as in other cases, to demand that his wife shall reside in the same house with himself." Where, however, a well established custom exists for a child-wife to remain away from her husband, and not to come to live with him in his house, until a certain event has occurred, such custom has been recognized by the Court (Suntosh Ram *v.* Gera Patuk, 23 W. R. 22).

8. By the act relating to the guardianship of minors (Act XL of 1858) it is provided that nothing in the Act shall authorize the appointment of a guardian of the person of a female whose husband is not a minor. Where the husband is himself a minor, his guardian would, as a rule, be also guardian of the wife. This follows the rule :—

मृते भर्त्तर्य्यपुत्रायाः पतिपक्षः प्रभुः स्मृतः ।

Where the wife is an infant and the husband seeks to have her in his custody, the proper course for him is to proceed according to the provisions of Act IX of 1861.

Summary proceeding obtaining possession of a wife who is a minor.

The husband may also by a civil suit obtain an injunction upon any person detaining the wife, to abstain from putting any obstruction in the way of the wife's returning to her husband. But no order can be made upon such person directing him to send the wife to her husband.

Suit for restitution of conjugal rights.

9. Where the wife is qualified by her age to perform her conjugal duties, the proper remedy for the husband is a suit for restitution of conjugal rights (Moonshee Buzloor Rahim *v.* Shumsoonissa Begum, 11 M. I A. 551). Though this case was one in which the parties were Mahomedans yet the rule applies and has been applied to Hindus (Kati Ram Dookhinee *v.* Gendhinee, 23 W. R. 178; Jogendra Nandinee *v.* Hary Das, 5 I. L. R., Cal. p. 500).

10. It used to be held at one time that, in a suit for restitution of conjugal rights, the decree should direct the delivery of the wife bodily into her husband's hands. The language of Art. 34 of the second schedule of the Limitation Act (Act XV of 1877) which provides for suits for the recovery of a wife would appear to favour such a view. But it may be now taken as settled that the proper form of the decree should be thus "that the plaintiff is entitled to his conjugal rights and that his lawful wife, the defendant, be ordered to return to his protection" Koobar Khansama *v.* Jan Khansama, 8 W. R. 467; Chotur Bebee *v.* Amarchand, 6 W. R. 105.)

Mode of execution of the decree.

11. Regarding the mode of execution of such a decree there was some difference of opinion in the Indian Courts. While it was held by the High Conrt of Bengal in the case of Gatha Ram Mistree *v.* Kochin Attea Doomnee (3 W. R. 179) that the decree in such cases could only have the effect of a declaratory decree, and was incapable of enforcement by any coercive process against the wife, the Bombay High Court ruled that in case of disobedience the decree could be enforced by imprisonment of the wife under section 200 of Act VIII of 1859. The question has now been settled by section 260 of the Civil Procedure Code now in force.

The period of limitation.

12. For suits for the restitution of conjugal rights the period of limitation is two years, from the time when such restitution is demanded and refused, the party refusing being of full age and sound mind (Act XV of 1877, 2nd Schedule, No. 35)

13. Though as a general rule either spouse is entitled

to a decree for restitution of conjugal rights against the other, there are cases in which such decree will not be granted. Thus when a custom, binding upon a particular class or caste, is established, by which the husband is not to cohabit with his wife until a second ceremony is gone through after marriage, a claim for restitution will not be enforced where such ceremony has been neglected. (Bool Chand Kolta *v.* Mt. Jonakee, 24 W. R. 228; 25 W. R. 386.)

Circumstances which justify a wife to live apart.

14. The Hindu law allows the wife to desert her husband, if he is a lunatic or a deadly sinner, or an eunuch or a person afflicted with any loathsome disease. Accordingly the High Court of Bombay refused to decree restitution of conjugal rights in favour of a husband who was suffering from leprosy and syphilis, (Bai Prem Kuver *v.* Bhika Kulianji, 5 Bom. 209).

Cruelty and ill treatment

15. How far cruelty and ill-treatment would be an answer to a suit for restitution of conjugal rights is an important practical question. It is not every unkind act that would disentitle a husband to enforce his marital rights. The mere taking of a wife's jewels or the marrying of a second wife has been held to be no bar to a Hindu husband's claim for restitution of conjugal rights. (Jeebo Dhan Banya *v.* Mt. Sundhoo, 17 W. R 522; Veraswamy Chetti *v.* Appaswamy Chetti, 1 Mad. 375; Sita Nath Mookerjea *v.* Srimaty Haimabutty, 24 W. R. 337. Jagendra Nardinee *v.* Hary Das, I. L. R. 5 Cal. 500). The question what constitutes legal cruelty, sufficient to bar a claim for restitution of conjugal rights was very fully discussed by Mr. Justice Melvill in Yamuna Bai *v.* Narayan Moreshwer Pendse (I. L. R. 1 Bomb. 164) and the conclusion arrived at is, that the Hindu law on the question of what is legal cruelty would not differ materially from the English law; that to constitute legal cruelty there must be actual violence of such a character as to endanger personal health or safety; that mere pain to the mental feelings, such for instance as would result from an unfounded charge of infidelity, however, wantonly caused or keenly felt, would not come within the definition of legal cruelty.

16. Cruelty and ill-treatment by the mother or sister of the husband would justify the wife in demanding separate residence and maintenance. There is no decision on

the point. But it follows from the principles recognized in the cases cited above.

17. Where a husband had ill-treated a wife on account of a favourite mistress, and had agreed to separate from the wife, and had refused her maintenance, it was held that he was not entitled to insist upon the restitution of conjugal rights. (Moola *v.* Nandy and Mt. Poonia, 4 N. W. P. 109) Conjugal infidelity in the husband does not justify a wife to live apart.

Wife not bound to live with a degraded husband.

18. Where a Hindu husband kept a Mahomedan mistress, the Court considered that this was such conduct as rendered it impossible for his wife to live with him (Lala Govinda *v.* Dowlat Bati, 14 W. R 145.) By having intercourse with a Mahomedan, a Hindu becomes degraded. Such being the case, the wife ceases to be under any obligation to live with him. For the law is पतितम्बपतितं भजेत्

19. For the same reason a person who has renounced Hindooism is not entitled to enforce a claim for restitution of conjugal rights. Act XXI of 1850, by enacting that loss of caste or change of religion shall not inflict on any person forfeiture of rights or property, may seem to throw some doubt on the point. But it is now settled that a Hindu who becomes a convert to Christianity cannot claim restitution of conjugal rights (Muchoo *v.* Arzoon Sahoo, 5 W. R. 235.)

20. The case in which a Hindu husband or wife becomes a convert to Christianity, is provided for by Act XXI of 1866. Under that Act a convert can sue the Hindu husband or wife for conjugal society, and in case of refusal by such husband or wife to cohabit with the convert, on the ground of change of religion, the marriage between the parties is declared as dissolved.

Conjugal infidelity in the wife.

21. Conjugal infidelity in a wife would bar her claim for restitution of conjugal rights. The Hindu law allows a disloyal wife to be forsaken. Manu says :—

स्वच्छन्दगा वि या नारी तस्यास्त्यागो विधीयते ।
नचेव स्त्रीवधः कार्य्यः नचैवाङ्ग विकर्त्तनं ॥

22. According to Vijnaneshwar, an unchaste wife is not to be turned out of doors; but should be deprived of all her honours, and made to live upon gruel (See Mitakshara on Jagnyavalkya I, 82). If the wife leaves her

husband's house of her own accord, for purposes of adultery, she cannot claim to be taken back (Ilata Savitri *v.* Narayan, 1 Mad. H. C. 372). It would appear from the commentary of the Mitakshara that unless adultery is followed by pregnancy, it would not justify the husband in forsaking the disloyal wife. It seems that forsaking of the wife is allowed only where the wife becomes pregnant by adulterous intercourse. (Mit. on Jajnyavalkya, Chap. I, 82.) If adultery is not followed by pregnancy. then after expiation and after menses a wife may claim to be taken back.

: गर्भे त्यागो

If the wife would not perform penance, nor abandon her course of vice, she may be turned out. Vira Mitra, Chap. III, Part 1, sec. 10.

23. According to the Hindu Shastars adultery is a sin and also a crime. The Indian Penal Code, however, exempts the female offender from punishment, and makes the adulterer only punishable, at the instance of the husband. The reason for this indulgence in favour of the female offender is, that it would be inequitable to punish a Hindu wife for adultery, so long as the law allows the husband to take any number of wives.

24. Among English text writers on Hindu law there is some difference of opinion as to whether a civil suit would lie against an adulterer. It is true that, according to Hindu law, adultery is criminally punishable. But there is nothing in Hindu law to prevent a civil suit also.

25. The Bombay Sudder Court in one case awarded damages to the husband who sought to recover his wife from the defendant who had enticed her away (Hurku Shunkar *v* Ranju Monohur, 1 Bor. 353 cited in Morley's Digest, 288 The Supreme Court of Calcutta also held that a civil suit for damages may be brought against an adulterer even where the parties are Hindus. Soodasur Sain *v.* Lokenath Mullik (Montriou, p. 617).

SECTION XIII.

EFFECT OF MARRIAGE ON PERSONAL CAPACITY.

1. The Hindu law yields to no other system in maintaining the unity of man and wife. But it is more equitable, as it allows women to have a much larger share of freedom in the exercise of their rights during coverture. Re-marriage being allowed in other countries, the people there cannot be inclined to give any property to their wives; and the identity of the husband and wife is taken advantage of to maintaining the doctrine that a female can have no separate property.

2. In this country also there was perhaps a time when married women could have no property of their own. Manu says :—

भार्य्या पुत्रश्च दासश्च त्रय एवाधनाः, स्मृताः ॥
यत्ते समधिगच्छन्ति यस्यैते तस्य तद्धनं ॥

Manu, Chap. VIII, 415.

Hindu wives may hold separate property.

But at a very early period the sages laid down that unmarried damsels, as well as married women, may hold certain descriptions of property as their own; and that neither the husband nor the sons, nor father nor brothers can have any right over such property. The property which a married woman brings from her father's house, whether at the time of her marriage or afterwards, and the personal ornaments given by the husband or his relatives naturally come to be regarded as Stridhan or separate property. At a later time certain kinds of property are included in the category. And ultimately the doctrine is established, that females are capable of holding any kind of property as their Stridhan.

4. Re-marriage of widows being unknown in this country, people generally settle a large portion of their wealth on their wives partly as a provident fund, and partly out of affection. Hindu wives being thus allowed to hold separate property, they are also allowed to enter into contracts independent of their husband. The sages by declaring that the wife is bound to pay the debts contracted by her, clearly recognize her power to contract.

A Hindu married woman may enter into contracts independently of the husband.

5. A Hindu married woman is under the Indian Contract Act (sec. 11) competent to contract, if not disqualified by reason of minority or unsoundness of mind.

May sue and be sued alone.

6. A Hindu married woman may sue and be sued alone and in her own name (Bhoirav Chandra Das *v.* Madhub Chandra Poramanik, 1 Hyde, 281). She may also sue and be sued by her husband.

Not exempt from arrest.

7. A Hindu wife is not exempt from arrest in execution of a decree (Maharanee Adhiranee Narain Coomari *v.* Boroda Sunderi Dabee, 10 W. R. 21; sec. 640 of Act XIV of 1882.)

May be a witness for or against the husband.

8. As a consequence of the legal identity of husband and wife, and with a view to prevent mutual distrust, it was at one time a fundamental rule of English law, that a husband or wife could not be a competent witness for or against one another. In India the husband or wife of any party, in any legal proceeding, whether civil or criminal, may be a competent witness in such proceeding (sec. 120, Evidence Act) Communications made during coverture are privileged (sec. 122).

May be superseded by another wife.

9. A Hindu husband may marry again during the lifetime of his wife, though such marriage, if contracted without just cause, is disapproved. The causes which justify supersession of the wife and re-marriage during her lifetime are barrenness, continual ill-health, misconduct &c., as mentioned in the texts quoted in p. 67.

But may not be forsaken except for adultery unexpiated or followed by pregnancy.

10. Although a barren wife, or one who produces only daughters, may be lawfully superseded; yet it is doubtful whether such a wife can be forsaken. It would seem that a virtuous wife can never be forsaken, for त्याग is one thing and अधिवेदन or supersession is another thing.

Divorce unknown in Hindu law.

But allowed by custom among the low castes in the Western Presidency and among certain aboriginal tribes.

11. Divorce or dissolution of marriage is unknown in the written laws of the Hindus. But there are some low castes in the Bombay Presidency in Assam and certain other places, among whom the practice of divorce and the re-marriage of divorced wives prevail. The ground upon which such divorce is most commonly granted, is the mutual consent of the husband and the wife, the former granting the latter a *char chitti* or letter of release. Divorce is also allowed on the ground of ill-treatment. Kasi Ram Kripa Ram *v.* Bar Umba, 3 Morley, 181 The Panchayet or the heads of the caste sometimes granted divorce even

against the will of the husband. But the Courts of law have refused to recognize the authority of the caste assembly in the matter (Reg. v. Sambhu Raghu, I. L. R. 1 Bom. 347; Rahi *v.* Govind, Ib. 116; Narayan Bharathi *v.* Laving Bharathi, I. L. R. 2 Bomb. 140; Reg. *v.* Korsan Goja, 2 Bom. 117.)

12. In the last case the prisoner Korsan Goja had married and cohabited with one Rupa a married woman who had repudiated her former husband without his consent. Thereupon Korsan was tried for adultery, and Rupa for marrying again in her husband's lifetime. The defence was, that by the custom of the caste, a woman might, without the consent of her husband leave him, and contract a valid marriage called *natra* with another man. They were both convicted, and the High Court of Bombay, in upholding the conviction, observed: "We are of opinion that such caste custom as that set up is invalid, as being entirely opposed to the spirit of the Hindu law; and we hold that a marriage entered into in accordance with it, is void."

13. According to the written law of the Hindus, the relationship between the husband and wife can never be dissolved. Under certain circumstances, the parties may forsake, *i. e.*, forbear from the company of each other. But even then their relationship is not dissolved.

14. The forsaking of a faithful and loving wife is, according to the sages, punishable by the king. Narada says:—

अनुकूलामवाग्दुष्टां दक्षां साध्वीं प्रजावतीं ।
त्यजन भार्य्यामवस्थाप्यो राज्ञा दण्डेन भूयसा

15. Though there are several texts which authorize the marriage of widows, or indicate that the re-marriage of widows is legal, yet for several reasons the marriage of widows has become obsolete from a very early period. There are some passages in Manu which denounce the re-marriage of widows. But these psssages are evidently interpolations. The question being now set at rest by the Legislature, it would not be of much use to discuss it here. Suffice it to state here that, according to the orthodox pundits of the country, the re-marriage of widows is legal; for, beside the express text of Parasara, there are ample indications in the Shastars to shew that the re-

marriage of widows is not absolutely prohibited. One of the several kinds of sons recognized in the Shastars is the son of the re-married widow. Then again, the following text of Vishnu provides a rule for partition where the mother is married successively to two husbands.

एकमाता द्वयोर्यत्र पितरौ द्वौ च कुत्रचित् ।
तयोर्यस्य पित्र्यं स्यात् स तद्गृह्णीत नेतरः ॥

The practice, however, having become obsolete from a long time, certain ideas have gained ground which are inconsistent with it. For instance, it is now generally supposed that a daughter must be given in marriage by the father or other guardian, in order to constitute a valid marriage. There is clear authority in the Shastars for Swamver or selection of husband by the bride herself. But as Swamver has become obsolete also, the Hindu of the present day cannot conceive how a widow can be remarried.

Popular ideas inconsistent with the possibility of the remarriage of widows.

16. The form of marriage, which prevails at the present time, favours the idea that there can be no marriage unless the father or other guardian makes a gift of the bride. The whole ceremony partakes of the nature of a gift; and the gift is supposed to be of a similar nature to that of any other article. But the fact is, that the father only presides at the ceremony; and though the ceremony is made to partake of the nature of a gift, there can be no such thing as a gift of a child by the father. In a case of real gift, the donor has right over the thing given. But in a child, the father cannot have any such absolute right. He presides at the ceremony as guardian.

A dogma apparently inconsistent with the possibility of the remarriage of widows.

17. Then again there are certain dogmas in the Shastars which are apparently inconsistent with the possibility of the re-marriage of widows. It is believed that the mother partakes of Pindas with her husband. Where the mother was successively married to two husbands, the question arises whether she can partake of Pindas with her husbands after death. The fact is, that the mother does not eat out of the same plate. But only simultaneously. By transmigration, the mother may be born again and she may be in one country and the father in another. The pinda may be eaten by them at the same time but not out of the same plate.

Is the son a remarried widow entitled to be regarded as Aurasa n.

18. For the practical lawyer these questions are not of any importance at the present day. There is, however a question connected with this subject which has practical importance. According to Hindu law, as laid down in the ancient Shmritis the son of a re-married widow held a very inferior rank among secondary sons. At a later time all the secondary sons with the exception of Dattaka were declared obsolete. Though the re-marriage of widows has been declared legal by Act XV of 1856, yet it leaves open the question whether the son of such re-married widow is to be considered as Aurasa or as Punarvaba.

19. Section 5 of the Widow Marriage Act provides that "every widow who has remarried shall have the same rights of inheritance as she would have had, had such marriage been her first marriage." The remarried widow is therefore row entitled to inherit as heiress to her second husband, though according to the Shastars she is clearly not so entitled.

CHAPTER IV.

THE LAW OF ADOPTION.

SECTION I.

THE SUBSIDIARY SONS.

The ancient Institutes of the Hindus recognize fifteen different kinds of sons. To the legitimate son, begotten by a man himself, on his lawfully married wife, is assigned the highest rank; and the son of the appointed daughter is declared as equal to the Aurasa. But, beside the Aurasa son, and the son of the appointed daughter, there are enumerated in the Shastars several kinds of secondary sons. With reference to these secondary sons, Vrihaspati says:

The subsidiary sons as substitutes of the Aurasa.

पुत्रास्त्रयोदश प्रोक्ता मनुना येऽनुपूर्वशः।
सन्तानकारणं तेषामौरसः पुत्रिका तथा॥
आज्यं विना यथा तैलं सद्भिः प्रतिनिधीकृतम्।
तथैकादश पुत्रास्तु पुत्रिकौरसयोर्विना॥

(Of the thirteen sons who have been enumerated by Manu in their order, the legitimate son and the son of the appointed daughter are the cause of lineage. As oil is substituted by the virtuous for liquid butter, so the eleven (secondary) sons take the place of sons in default of the legitimate son, and the son of the appointed daughter.

The secondary sons are enumerated by the Rishis in the following texts. Manu says:

औरसः क्षेत्रजश्चैव दत्तः कृत्रिम एव च।
गूढोत्पन्नोऽपविद्धश्च दायादा बान्धवाश्च षट्॥
कानीनश्च सहोढश्च क्रीतः पौनर्भवस्तथा।
स्वयं दत्तश्च शौद्रश्च षडदायादबान्धवाः॥

Jajnyavalkya says:

औरसो धर्म्मपत्नीजस्तत्समः पुत्रिकासुतः ।
क्षेत्रजः क्षेत्रजातस्तु सगोत्रेणेतरेण वा ॥
गृहे प्रच्छन्न उत्पन्नो गूढजस्तु सुतः स्मृतः ।
कानीनः कन्यकाजातो मातामहसुतो मतः ॥
अक्षतायां क्षतायाम्वा जातः पौनर्भवः सुतः ।
दद्यान्माता पिता वा यं स पुत्रो दत्तको भवेत् ॥
क्रीतश्च ताभ्यां विक्रीतः कृत्रिमः स्यात् स्वयं कृतः ।
दत्तात्मा तु स्वयं दत्तो गर्भेविन्नः सहोढजः ॥
उत्सृष्टो गृह्यते यस्तु सोऽपविद्धो भवेत् सुतः ।
पिण्डदोंऽशहरश्चैषां पूर्व्वाभावे परः परः ॥

For the texts of other Rishis, see Dattaka Chandrika sec. V. On going through these texts, it would appear that the secondary sons are of the three following classes:

Classification of subsidiary sons.

(1.) One class consists of those who are legitimate sons; but are held in low estimation on account of the mother being of a different caste, or on account of her being a twice married woman.

(2.) The second class consists of illegitimate sons of certain descriptions.

(3.) The third class consists of sons acquired by gift, purchase &c.

Class (1) sons borne on a wife of a lower caste or on a re-married wife.

With reference to class (1) it is to be observed that, according to the sages, marriage is a Sanskara or purifying ceremony. The rule which requires the Sanskara is satisfied by the first marriage. The first marriage is for the sake of fulfiling a religious duty; the subsequent marriages are for the sake of lust. At a time when the institution of marriage was not completely established, it was not possible to exclude the son of the re-married widow altogether. But in order to enforce marriage the sages found it necessary to lay down rules and dogmas which made the people look upon the re-marriage of widows with disfavour. In fact the sages themselves prepared the way for the final abolition of the practice by including the son of the re-married widow among secondary sons.

For reasons which are obvious, the legitimate son borne on a Sudra wife by a twice-born man was placed last in rank among secondary sons. The contempt which was

thus shewn towards the marriage of a twice-born man with a Sudra woman ultimately led to the abolition of such intermarriage.

Class (2) of the secondary sons recognized by the early sages consist of—

(1.) The Khetraja or son begotten on the wife of a sonless man by his brother or other relative.

(2.) Gudraja or son begotten on the wife by some unknown person.

(3.) Kanina or son begotten on an unmarried damsel.

(4.) Sahoraja or son of a pregnant bride.

Class (2) Bastards.

All these are illegitimate sons; and it seems altogether incomprehensible how they could ever be classed even among secondary sons. The fact is, that in the primitive times, a male child was a necessity. "The sonless father" as Mr. Mayne observes "would find himself without protection or support in sickness or old age; and would see his lands passing into other hands, when he became unable to cultivate it." Quite apart from the religious motive upon which the sages lay so much stress, a son was so indispensable, that as Mr. Mayne observes "every contrivance would be exhausted to procure one; and neither delicacy nor sentiment would stand in the way."

The reason why the earlier sages recognised bastards.

Although the Hindu sages lay down that a son is absolutely necessary for salvation, it is doubtful whether the religious motive had any independent influence on the people generally, when they recognized the Khetraja and other illegitimate sons. In all probability, the practice existed long before the Shastars recognized it. If one reads between the lines, he would see that the sages do not recommend it. On the contrary by assigning religious motives, they indirectly curtailed the practice within the narrowest limits. If Niyoga or appointment of a person to raise issue on the wife of another is legal, on account of the spiritual necessity of a son, then such appointment is not legal, except when the husband is altogether sonless. Nor was it allowable, except so far as was necessary for giving birth to one son only. When the practice was general, it would have been fruitless to declare it altogether illegal. The sages could not presume to abolish a long standing and universal practice; at one stroke of their pen. It was absolutely necessary for legislators, in those ages, to show due respect for custom; and it was

not altogether safe to declare such a custom illegal. In the case under consideration, the custom was abominable in the highest degree; but it was apparently universal; and it could not be declared as illegal all at once. The sages gave such a basis to it, as to restrict it within the narrowest limits in the beginning, and to lead to its abolition ultimately.

In our times, the institution of marriage is so completely established, that we can hardly form an idea of the difficulties which the early legislators had to encounter in bringing about this result. We take the existing order of things as a matter of course; and we are apt to look with horror on the passages of the Shastars which recognize the Khetraja, Gudraja and other illegitimate sons. But it ought to be borne in mind that the sages were not working on a *tabula rasa* Their object was not to paint an ideal picture of what ought to be; but to compile a code for the guidance of society. Such a code must recognize existing customs; and if a reformation appeared necessary, it was to be affected with a show of due regard to the existing customs.

There are indications in the Shastars that the people, in those ages, not only recognized but quarrelled about the right to Khetraja sons To decide such disputes, the sages ruled that the Khetraja and the Gudraja sons should belong to the husband of the mother. When the husband of the mother was so anxious to have the right of *patria potestas* over the bastard, it was but equitable that the bastard should be declared entitled to succeed as heir to him in default of the Aurasa. In fact that is a result which, in all probability, took place in the usual course of things in those times. It is quite possible that the bastard sometimes claimed equal rights with the Aurasa; and the sages did not extend but rather curtailed his rights. With the genius of true statesmanship, the sages recognized the Khetraja and other bastard sons in such manner as to lower their position as much as possible; and to elevate that of the Aurasa in a corresponding degree. Thus every possible inducement was given to people to give their daughters in marriage instead of allowing promiscuous intercourse. The general prevalence of marriage has ultimately made the bastard son obsolete altogether in Hindu society.

How the [ba]stard has [be]en render[ed] obsolete.

The Shastars enjoin that a girl must be given in marriage before puberty, and the sin incurred by not giving a girl in marriage before maturity is declared to be so great that, except among Kulins, the marriage of a grown up woman is unknown among Hindus. To a Hindu, unacquainted with the custom of any other society but his own, the marriage of a grown up woman seems to be almost impossible. Such being the state of things among the Hindus from a long time, the Kanina and the Sahodra, have become obsolete altogether.

The Kanina and Sahodra rendered obsolete by the general prevalence of the practise of giving girls in marriage before maturity.

The Khetraja and the Gudraja have long since become obsolete also. When the marriage tie was yet loose, and women were regarded as a sort of property, there could be nothing shocking in the practice of Niyoga. The marriage of a woman with two brothers successively is merely the converse of the marriage of a man with two sisters, which is legal according to the Shastars. On the death of the husband, the widow would continue to reside in the same house with her brother-in-law; and she would pass to the surviving brother who succeeds as manager. The transition is so natural, that it indicates great progress in civilisation in Hindu society that the practise of Niyoga has become obsolete. After the death of the father, the eldest brother succeeds him as manager and head of the family; and the younger brothers look upon him as father and upon his wife as mother. The sentiments thus developed find expression in such texts as the following:

The eldest brother's wife being generally venerated as mother, Niyoga became obsolete at a very early period; and the Khetraja son became obsolete also.

ज्येष्ठ एव तु गृह्णीयात् पित्र्यं धनमशेषतः।
शेषास्तमुपजीवेयु र्यथैव पितरं तथा॥ Manu IX, 111.

[The eldest brother may take the patrimony; and the rest may live under him as under their father]

Vrihaspati says:

मातुःस्वसा मातुलानी पितृव्यस्त्री पितृस्वसा।
श्वश्रूः पूर्व्वजपत्नी च मातृतुल्याः प्रकीर्त्तिताः॥

[The mother's sister, the maternal uncle's wife, the father's sister, the mother-in-law and *the wife of an elder brother are pronounced similar to mother.*]

The eldest brother's wife is at the present day actually revered as mother; and the very idea of Niyoga would be shocking to a Hindu who is unacquainted with the fact

that, at one time, it was legal according to the Shastars. All the secondary sons, with the exception of the Dattaka, have not only become obsolete, but according to the Shastars, they are not sons at all in the present age. Vrihaspati says:

In the Kali age secondary sons are not sons according to Vrihaspati.

अनेकधाः कृताः पुत्रा ऋषिभि र्यै पुरातनैः ।
न शक्यन्ते धुना कर्त्तुं शक्तिहीनै रिदन्तनै ॥

[Sons of many descriptions who were made by ancient saints cannot now be adopted by men, by reason of their deficiency of power.]

Of all the secondary the Dattaka alone is recognised in the present age

Then again the Aditya Puran after reciting:—

दत्तौरसेतरेषान्तु पुत्रत्वेन परिग्रहः । *
कन्यानामसवर्णानां विवाहश्च द्विजातिभिः ॥

Authority of the Aditya Puran.

goes on to say,—

एतानि लोकगुप्त्यर्थं कलेरादौ महात्मभिः ।
निवर्त्तितानि कर्म्माणि व्यवस्थापूर्व्वकं बुधैः ॥
समयश्चापि साधूनां प्रमाणं वेदवद्भवेत् ।

The reader must notice the ground on which Vrihaspati declares that the several kinds of secondary sons cannot be recognized as such in the present age. Vrihaspati does not say, that the ancient custom or law is bad; but that people in the present age have not power enough to do all that the ancients did. Thus due respect is shewn to ancient law, at the same time that it is repealed.

SECTION II.

THE DATTAKA SON.

Scarcity of authority as to the law of adoption.

It has been already stated that the secondary sons recognized by the ancient Rishis have all become obsolete in the present age with the single exception of the Dattaka. Thus the Dattaka form of adoption has acquired an

* The recognition, as son, of any other than the legitimate and the Dattaka, the intermarriage between different castes &c —these are prohibited by the great and the learned in the beginning of the Kali age, for preservation of society The rules laid down by the wise are as binding as those prescribed by the Vedas."

importance which it apparently never had in ancient times. Neither in the Sanhitas nor in the Digests is the subject dealt with exhaustively. One might go through all the original Hindu Law books, from the Sutra works to the compilation of Raghu Nandana, without discovering that adoption is a matter of any importance in the Hindu system. Raghu Nandana deals with all the topics of law and ritual as exhaustively and as systematically as can be expected. But he does not devote a separate chapter to the subject, and notices it only incidentally in the chapter on marriage. With the exception of the Dattaka Mimansa by Nanda Pandita who lived in the 17th century, all the other books on the subject are quite modern works, being most probably written after the commencement of British rule. The Dattaka Chandrika is commonly ascribed to Devandra Bhatta But there is ample evidence in support of the tradition that it is the work of Pundit Raghumoni of Nadiya who lived in the latter part of the last century.

The law of adoption, as at present administered, is a purely modern development from a very few old texts. The very absence of direct authority has caused an immense growth of subtilities and refinements. The effect that every adoption must have upon the devolution of property causes every case that can be disputed, to be brought into Court. Fresh rules are imagined or invented; and some of the most important points of the law have been decided in a manner which is far from being satisfactory.

The importance of the Dattaka son in the present age.

It is not difficult to see why sons, acquired by any means other than gift, have become obsolete; while the son given, has increased in importance. A child bought is more like a slave than a son. The son self-given must necessarily be too advanced in years to be completely affiliated Over the deserted son, the adoptive father can never acquire complete dominion. They all enter the family under such disadvantage, that they can never attain the position of an Aurasa son; while the given son would not be given at all, unless there is an express or implied promise that he, the given son, would be treated like an Aurasa son. Thus the given son alone is recognized in these ages; while the son bought and the son self given have become obsolete.

SECTION III.

OBJECT OF ADOPTION.

The following text of Manu defines the object for which a sonless man is enjoined to take a secondary son by adoption :

अपुत्रेण सुतः कार्यो यादृक् तादृक् प्रयत्नतः ।
पिण्डोदकक्रियाहेतोर्नामसङ्कीर्त्तनाय च ॥

[A son of any description must be anxiously adopted by a man destitute of male issue for the sake of the funeral cake, water and solemn rite, and for perpetuating his name, *i. e.*, his lineage.]

It thus appears that objects for which an adoption may be made are fourfold, *viz.* :—

The purposes for which a subsidiary son is required.

(1.) Performance of funeral ceremonies.
(2.) Performance of shradh.
(3.) Performance of tarpan or the giving of libations of water.
(4.) Perpetuation of lineage.

Perpetuation of lineage main object.

The author of the Chandrika has shewn that the perpetuation of lineage is the main object. For a man who has a brother's son may yet adopt a son, though he does not stand in need of a secondary son, for any spiritual purpose. The following text declares that a brother's son confers all that spiritual benefit which a man's own son does. Manu says:

सर्व्वेषामेकजातानामेकश्चेत् पुत्रवान् भवेत् ।
सर्व्वे ते तेन पुत्रेण पुत्रिणो मनुरब्रवीत् ॥

[If one among brothers of the whole blood, be possessed of male issue, Manu pronounces that they are all fathers by means of that son.].

If the spiritual purposes had been the sole object of adoption, then a son could not be adopted by one who has a nephew. But perpetuation of lineage is not effected by a nephew as such; and a man having a nephew can yet adopt a son for the last mentioned object.

Then again it is declared by the following text that among several co-wives, if one gives birth to a son all the

rest derive from that son the spiritual advantage of having a son:

सर्व्वासामेकपत्नीनामेकाचेत् पुत्रिणी भवेत् ।
सर्व्वास्तास्तेन पुत्रेण प्राह पुत्रवती मनुः ॥

By the son of the co-wife the lineage of the husband is preserved; and the sonless wife cannot, under the circumstances, adopt a son. For a female can have no lineage of her own to be perpetuated; and as for shradh and other spiritual purposes, they are performed by the co-wife's son who is declared as equal to a son by the above text.

It thus appears that where perpetuation of lineage is required, a son can be adopted even though there be no spiritual necessity On the other hand where perpetuation of lineage is not required, there a son cannot be adopted for spiritual purposes only. It follows therefore that the perpetuation of lineage is the main object of adoption. This is the doctrine of the Chandrika; and Pandit Sama Charan Sirkar quotes it with approval. (Vyavastha Darpan, 1st Edition, p 833.) The Mimansa may at first sight appear to maintain a different view, but as the text of Manu is quoted in the Mimansa, it must be obvious that Nanda Pandit could not lay down a doctrine which would be inconsistent with that text.

SECTION IV.

WHO CAN ADOPT A SON.

From the text of Manu quoted in the last section, it appears that only a sonless man can take a son in adoption. A man who never had a son as well as one whose son is dead may adopt; for Saunaka says:

Only a sonless man may adopt.

अपुत्रो मृतपुत्रो वा पुत्रार्थं समुपोष्य च ।

Although by the birth of a son a man becomes free from the debt which he owes to his ancestors, yet on that son being dead, a Dattaka may be taken for the purposes mentioned in the texts of Manu and Atri.

The word sonless in the texts means one who has no son, grandson or great-grandson; for one having a grand-

son or great-grandson is not in need of an adopted son, either for spiritual or for temporal purposes.

A man who has a brother's son can yet adopt, as shewn in the last section. A man who has a daughter's son can yet adopt, although the following texts declare that a daughter's son is like a son's son :

अक्षता वा क्षता वापि यं विन्देत् सदृशात् सुतं ।
पौत्री मातामहस्तेन दद्यात् पिण्डं हरेद्धनं ॥

A man having one adopted son living, cannot take another in adoption (Rangama *v.* Atchama, 4 M I. A. p. 1.)

Simultaneous adoption by the several wives of the same man.

If there be several wives, then each can take a child in adoption simultaneously with the permission of the husband. There is no direct authority on this point. But if, as will be shewn afterwards, a woman adopts in her own right, and not as agent for her husband, then there can be nothing to prevent simultaneous adoptions by the several wives of the same man.

When a man's wife is with child, he cannot adopt (Narain *v* Bedachall, Mad. Dec. 1860.)

A minor may adopt.

A minor can accept a gift and utter Vedic mantras; and can therefore take a child in adoption, if he understands the nature of the act (Rajendra Narain *v.* Sharoda, 15 W. R. 548; Piyari *v.* Har Bansi, 19 W. R. 127.)

A disqualified landholder under the guardianship of the Court of Wards cannot adopt without the permission of the Court.

An unmarried man may adopt.

One who has never married, or whose wife is dead, may adopt (Nagapa *v.* Sava Sustri, 2 Mad H. C. 361)

The husband can adopt without the consent of the wife (Dattaka Mimansa, sec. I, para. 29 ; 4 M. I. A. 2.)

A man afflicted with leprous sores cannot adopt; for one having sores on his body cannot perform acts prescribed by the Vedas.

A man afflicted with leprosy, but having no sores, may adopt if he has performed the penances.

A man afflicted with leprosy, in any form, may give permission to his wife to adopt.

Adopted sons of excluded persons not entitled to inherit.

The adopted sons of those who are excluded from inheritance, on account of mental or bodily disqualification, are not entitled to inherit as heir. With reference to disqualified persons, Jajnyavalkya says :

औरसः क्षेत्रजस्तेषां निर्दोषा भागहारिणः ।

[Their Aurasa and Khetraja sons being free from defects take their share]

The Aurasa and the Khetraja being specifically mentioned, the authors of the Mitakshara and Chandrika hold that the adopted son of a disqualified person is not entitled to a share on partition (Mitakshara, Chap. II, sec. X, para. 11, Chandrika sec. VI, para. 1.) It is not therefore of much practical importance whether a disqualified person can take a child in adoption.

A female cannot adopt without the consent of her husband.

A female cannot take a child in adoption without the consent of her husband. Vasista says:

न स्त्री पुत्रं दद्यात् प्रतिगृह्णीयाद्वान्यत्र भर्तुरनुज्ञानात् ।

According to the Bengal school of law, a widow can take a child in adoption, if she has the permission of her husband (Tara Mony *v.* Dev Narain, 3 S. D. 387.)

In Mithila it is held that a widow cannot adopt at all.

According to the Mithila school, a widow cannot adopt, it being impossible for her to obtain the consent of her husband. Dattaka Mimansa, sec. I, para. 16; Vivada Chintamony, 74; Jai Ram *v.* Dhami, 5 S. D. 3.

Bombay.

According to the Mayukha and the Kaustava which govern the Maharatta school, the text of Vasistha does not restrain the widow from doing that which is beneficent to her husband's soul.

According to the decisions of the Bombay High Court a Hindu widow who has not the family estate vested in her, and whose husband was not separated at the time of his death is not competent to adopt if she has not the sanction of her husband or his Sapindas. Komji *v.* Ghama, 6 I. L. R., 498.

Madras.

In Southern India the want of the husband's consent may be supplied by that of Sapindas. (The Collector of Madura *v* Mootoo Ram Singh Satapaty, 2 P. C. J. p. 361.

Benares.

The doctrine of the Benares School is held to be the same as that of Bengal, though it is difficult to see, upon what authority this conclusion has been arrived at. The Dattaka Mimansa says, that a widow cannot adopt at all, because the assent of the husband is impossible (Dattaka Mimansa, sec I, para 16) The Vira Mitrodaya says that the assent of the kinsmen suffices. Thus there is conflict between the two works of very high authority in the Benares School. It is said that the custom which prevails in Northern India is in accordance with the authorities of the Bengal school; and the doctrines laid down on the point in the Dattaka Mimansa and the Vira Mitrodaya

have not been accepted by those who follow these auth ties in other matters (Shumshere Mull *v.* Dilraj Kon 2 S. D. 169.

Unchaste wife.

It has been held that an unchaste widow cannot ad even though she has the permission of her deceased h band (Syam Lal *v.* Sauda miny, 5 B. L. R. 362.)

SECTION V.

ADOPTION BY WIDOW.

It is generally supposed that when a female adopts, she does so as agent for her husband. The fallacy shewn.

It is generally supposed that when a widow take child in adoption she does so as agent of her husba (Chowdry Pudum Singh *v.* Koer Oody Singh, 2 P. C. p. 417; Vyavastha Darpan, page 870; Mayne's Hin Law, § 104). Para. 21 of sec. I of the Dattaka Miman seems to support such a view. But according to t Mimansa, a widow cannot adopt at all; and whether th widow adopts in her own right, or as agent for her hu band, is a question which does not arise at all accordin to Nanda Pandita's view of the law. The author of th Mimansa has laid down that a female cannot adopt at all on the ground that the texts of Manu and Atri, whic authorize adoption, do not apply to females, the word son less in the text being in the masculine gender. In orde to be consistent, Nanda Pandita had no other alternativ than to explain the word बौधायन in the text of Satya Sara in the way that he has done.

Nanda Pandita argues that if a female could adopt in her own right, then the son adopted by her would not be entitled to perform the funeral ceremonies of her husband; nor would such a son be a partaker of the husband's Gotra. As the wife has the same Gotra as the husband, it is difficult to see why the son adopted by the wife should not partake of the husband's Gotra. Then again under the text of Vasistha, a female cannot adopt at all without the assent of her husband; and when there is permission, it is but reasonable to presume that the son adopted by the wife or widow is also the son of the husband, just as the son adopted by the husband is regarded as the son of the wife also. If the relation of being son is established, then the son would perform the funeral ceremonies of the father, although the adoption was made by the mother.

If Nanda Pandita's view is to be accepted, then a widow

cannot adopt at all. When it is held that a widow can adopt, Nanda Pandit's dictum as to the position of a female adopter can by no means be accepted. The fact is, that when a widow adopts, she does so in her own right under the texts of Manu and Atri; and not as agent for her deceased husband. But, under the text of Vasistha, she cannot exercise her power, except with the consent of her lord. According to the authorities of the Maharastra school, the widow can adopt, even without the permission of her deceased husband, provided there is no prohibition. In the Dravira countries, the widow can adopt with the consent of her husband's Sapindas. These doctrines and rules would be altogether inexplicable on the principle that in adopting a child, with the permission of her husband, the widow acts as agent for him. The ruling laid down in Bamun Das *v.* Tarinee, (1 P. C. J. 616), is consistent only on the principle that the widow acts in her own right.

Mr. Mayne in his treatise on Hindu Law, says: "It is a curious thing that while the husband's right is recognized to delegate to his widow an authority to adopt, he can delegate it to no one else. In cases where the assent of Sapindas will supply the place of an authority by the husband, that assent must be sought for and acted upon by the widow. When no authority is given or required, the widow alone can perform the act." To account for all this, Mr. Mayne goes on to say—"The reason probably is, that she is looked upon not merely as agent, but as the surviving half of himself, and therefore exercising an independent discretion which can neither be supplied nor controlled by any one else." Had the author taken into consideration the drift of the discussion in paras. 7, 23, 24, 25 and 26 of sec. I of the Dattaka Chandrika, he could not have taken such an erroneous view of the position of a female adopter. But it is no easy thing for English lawyers to enter into the spirit of the discussions in Hindu Law treatises; and it is no wonder that they fall into such errors, at every step. In interpreting the texts of Manu and Atri, the author of the Chandrika says, that although the word sonless is in the masculine gender, it ought to be taken to include also females having no son, in order to make it harmonise with the text of Vasistha, according to which, a female can adopt with the permis-

sion of her husband. The result evidently is, that a fema adopts in her own right, just as a male, there being onl this difference, that a female cannot adopt without th consent of her husband.

In paras 23-26 of section I, the author shews that female cannot adopt, if there be a son to her husband by a co-wife. If the widow adopted only as agent, then all the reasoning in this part of the Chandrika is absolutely useless. A man certainly cannot do that through an agent which he cannot do himself; and no one would contend that a man who has a son by one wife can empower another as agent to adopt Females can adopt in their own right under the texts of Manu and Atri. The question to be solved is, whether a female, whose husband has a son by a co-wife can adopt even though authorized by the husband. If females adopt as agents for their husbands, then the answer is plain. For the husband having a son already cannot authorise a wife as agent to do that which he himself could not. But females adopt in their own right; and hence arose the difficulty which is solved in the manner referred to already. (See page 115 *ante.*)

When a widow takes a child in adoption she acts neither as agent nor as surviving half of her husband. Considering the nature of the ceremony which must be gone through, it is very doubtful whether adoption can be made through an agent. Although a wife is regarded as the surviving half of her husband, yet that is true only in a secondary sense. At any events, she cannot be constituted as an agent for the performance of all acts prescribed by the Vedas. She can act as agent in keeping the sacred fire, and in certain other matters; but she cannot be agent for the performance of Srauta acts which must be performed by a man himself (see page 59 *ante*). It is difficult to see how a deceased man can legally take a child in adoption through an agent, for agency is terminated by death. Then again, the rules enjoined by the Shastars apply to the living and not to the dead: so that when a man is dead, neither the text of Manu nor that of Atri would empower or require him to adopt a son.

According to the Dravira school, the assent of Sapindas is regarded as sufficient to authorize a widow to adopt in the absence of any express permission from the deceased husband. This would be altogether anomalous, if the

widow be regarded as agent for her husband; for agency cannot be created by any one except the principal or his agent. The truth is, that although according to the texts of Manu and Atri, a female can adopt in her own right, she must, according to Vashishta, have the permission of her husband before doing so The Southern jurists would only add that the word husband in the text of Vasishta is used indefinitely to denote any legal guardian.

According to the authorities of the Maharastra school, a widow can adopt even without the permission of her husband or his Sapindas, provided there is no prohibition. It may be reasonably contended that when the husband is dead, his sanction can no longer be required under the text of Vasistha. It may also be contended that want of prohibition indicates sanction according to the maxim अप्रतिषिद्ध परमतमनुमतं. But nothing could be more anomalous than the position that the widow adopts as self-constituted agent of a person who is dead.

It has been laid down in the case of Bamun Das *v.* Tarinee (1 P. C. J. p 616) that an express authority or even direction by a husband to his widow to adopt is, for all legal purposes, absolutely non-existent, until acted upon. This ruling is consistent only on the principle that when a widow adopts a child, she does so in her own right and not as agent. If the position of the widow, who has authority to adopt, be that of an agent, then the ruling laid down in Bamun Das *v.* Tarinee would be clearly open to question.

It has been held in several cases that a widow who has her husband's permission can take a child in adoption at any time even long after the husband's death (Ram Soonder *v.* Sorvani Dasee, 22 W. R 121) If the widow be held to be acting in her own right, then there would be nothing anomalous in this ruling. In the case of Ram Soonder *v.* Sarvani, the facts were as follows:—One Govinda Charan executed some time before his death an Anumati Patra to his wife Sarvani, giving her permission to adopt, on the failure of each adopted son, five sons in succession. Shortly after the death of Govinda, his widow adopted a boy of the name Krista Charan who died ten or twelve years after his adoption Some time after the death of Krista Charan, the widow adopted another child; and it was to set aside the latter adoption, that the suit was

brought. In special appeal, it was contended that, admitting the deed of permission to be genuine, yet the first adopted son had lived to an age sufficiently mature to perform all the acts of spiritual benefit, to secure which, the Anumati Patra was executed; and the power given to Sarvani had therefore ceased to have any operative force. Mr. Justice R. C. Mittra, who delivered judgment in the case, overruled the contention on the ground that the first adopted son could not exhaust the whole of the spiritual benefit which a son is capable of conferring on his deceased father. The actual decision in the case is correct, but the ground on which it is put, is manifestly erroneous. Conferring benefit on the deceased is neither the sole nor the principal object for which an adoption is made. However that be, if the position of the widow be that of an agent, then there is no other alternative than to rely upon such grounds, for the ruling in question. But the widow does not act as an agent for her husband; she acts in her own right; and therefore she can exercise her power, at any time, provided she has the necessary sanction.

An Anumuti Patra which gives sanction to successive adoptions has been held to be not equivalent to a will (Bhoobun Moyee *v.* Ram Kishore, 10 M. I. A. 279). This ruling is consistent, only if the widow's position be as set forth above.

Although the widow, who has the necessary sanction, may take a child in adoption at any time, yet a subsequently adopted son, on the death of one previously adopted, would not take the estate, if the previously adopted son left a widow or daughter, or daughter's son in whom the estate vested at the time of his death. (Bhoobun Moyee *v* Ram Kishore)

If the widow of the first adopted son dies in the lifetime of her husband's adoptive mother, and the estate vests in the mother, then, according to the decision of the Bengal High Court, the estate vested in the mother is divested in favour of the subsequently adopted son (Bykant Mohun Roy *v* Kista Soonder Roy, 7 W. R p. 392) Unless the act of adoption be taken to imply abdication, this decision is open to question as intimated by the Privy Council. Ram Samin *v* Venkat Ram, 6 I. A.

SECTION VI.

PERMISSION TO ADOPT.

Permission to adopt—its form.

Permission to adopt may be given either verbally or by deed. If written authority is given by an instrument other than a will, then the same must be upon a stamped paper of Rs. 10, under No. 38, Schedule 1, Act I of 1879. A deed conferring authority to adopt must be registered. Authority to adopt cannot be conferred by an unregistered instrument executed after the 1st January 1872 (see Act III of 1877, secs. 17 and 49). Permission to adopt may be conditional, provided an adoption made, when the event happened, is otherwise legal. An authority to a widow to adopt, in the event of a disagreement between herself and a surviving son, would be invalid. But an authority to adopt, in the event of the death of a son then living, would be good; and so it would be, if the authority were to adopts everal sons in succession, on the death of those adopted before. The authority given must be strictly pursued; and can neither be varied nor extended. If the widow is directed to adopt a particular boy, she cannot adopt another, even though he should be unattainable. If she is authorized to adopt a son, her authority is exhausted as soon as she has made a single adoption (Purmanand *v.* Uma Kant, 4 S. D. 318; Gour Nath Chowdry *v.* Anna Poorna, S. D. of 1852; 332.)

SECTION VII.

WHO CAN GIVE IN ADOPTION.

Jagnyvalkya says:

दद्यान्माता पिता वा यं स पुत्रो दत्तको भवेत्।

Manu says:

माता पिता वा दद्यातां यमद्भिः पुत्रमापदि।
सदृशं प्रीतिसंयुक्तं स ज्ञेयो दत्रिमः सुतः॥

Although according to these texts, either the father or the mother can give a child in adoption, yet, under the text of Vasistha, the mother cannot give a child in adop-

tion without the consent of the father. According to the Chandrika, assent is presumed where there is no prohibition.

The parents only can give in adoption.

The parents being the only persons capable of giving a child in adoption, a child, whose parents are dead, cannot be adopted. The parents cannot delegate their power to another person, so as to enable him, after their death, to give away their son in adoption. (Boshitiappa *v.* Sivalingappa, 10 Bom. H. C., 268). A man having only one son cannot give him in adoption. Vasistha says:

न त्वेकं पुत्रं दद्यात् प्रतिगृह्णीयाद्वा ।

Saunaka says:

नैकपुत्रेण कर्त्तव्यं पुत्रदानं कदाचन ॥
बहुपुत्रेण कर्त्तव्यं पुत्रदानं प्रयत्नतः ॥

According to this text a man having many sons, that is, more than two, can give in adoptiom (see Chandrika para 30).

If the right to give in adoption is based on texts only then one, who has not many sons, cannot legally give in adoption an only son. But if it be that the father has proprietory right over his children, then he can give an only son, notwithstanding the prohibitions contained in the texts quoted above. The question will be discussed further on.

Section VIII.

WHO MAY BE TAKEN IN ADOPTION.

1. The adopted son must be of the same caste.

The adopted son must be of the same caste.

According to the Chandrika and the Mimansa, the word सदृश in the text of Manu cited in the last section, means one equal in caste. The word सदृश, according to Medhatithi, signifies not equality by caste but in quality. However that be, the following texts expressly declare that a boy of a different caste ought not to be taken in adoption; and if one of a different caste is taken, he is not entitled to inherit as heir. Saunaka says:

ब्राह्मणानां सपिण्डेषु कर्त्तव्यः पुत्रसंग्रहः ।
तदभावे ? सपिण्डे वा अन्यत्र तु न कारयेत् ॥
क्षत्रियाणां सजातौ वै गुरुगोत्रसमेऽपि वा ।
वैश्यानां वैश्यजातेषु शूद्राणां शूद्रजातिषु ॥
सर्व्वेषामेव वर्णानां जातिष्वेव न चान्यतः ।
यदि स्यादन्यजातीयो गृहीतोऽपि सुतः क्वचित् ॥
अंशभाजं न तं कुर्य्याच्छौनकस्य मतं हि तत् ।

The following text of Bridha Jajnyavalkya is also to the same effect:

सजातीयः सुतो ग्राह्यः पिण्डदाता स रिक्थभाक् ।
तदभावे विजातीयो वंशमात्रकरः स्मृतः ॥
ग्रासाच्छादनमात्रन्तु स लभेत तदृक्थिनः ।

In actual practice a boy of a different caste is never taken in adoption.

Preference should be given to brother's son.

2. If there is a brother's son, he ought to be adopted. This rule is deduced by inference from the texts quoted in sec. III which declare that a brother's son is equal to a son (Chandrika, sec. I, para. 20; Mimansa, sec. II, para. 28; Mitakshara, chap. I, sec. XI, para. 36.)

This rule, however, has been held to be directory and not mandatory (Gokulchand *v.* Wooma Daee, 15 B. L. R. 405; Babaji *v* Bhagiratha, 6 Bomb A. C. 70.)

Order of preference.

3. According to the text of Saunaka already cited, a Sapinda ought to be adopted if possible. If a Sapinda is not to be had, then one who is not a Sapinda may be taken. Among those who are not Sapindas, preference should be given to the Sagotra. In default of the Sapinda and the Sagotra, a boy may be adopted from a family which bears a different Gotra (Chandrika, sec. I, para. 11.) These are mere moral precepts; and are not of practical importance.

4. Among the twice-born classes:

Daughter's son &c cannot be adopted by the twice born.

(1.) The daughter's son.
(2.) The sister's son.
(3.) Maternal aunt's son cannot be adopted, for Sakala says:

समानगोत्रजाभावे पालयेदन्य गोत्रजं ।
दौहित्रं भागिनेयञ्च मातृस्वसृसुतं विना ॥

Among Sudras the daughter's son and the sister's son may be lawfully taken in adoption; for Saunaka says:

> दौहित्रो भागिनेयश्च शूद्रैस्तु क्रियते सुतः ।
> ब्राह्मणादित्रये नास्ति भागिनेयः सुतः क्वचित् ॥

The boy must bear the "reflection of a son."

5. The boy must be such as to bear the reflection of a son पुत्रच्छायावह, *i. e.*, capable of being begotten by the adopter by appointment or Niyoga; so that the brother, paternal uncle, maternal uncle, daughter's son, and sister's son are excluded (Mimansa, sec. V, para. 17; Chandrika, sec. II, para. 8.)

A man may take his wife's brother's son.

6. A man may take his wife's brother's son in adoption; for there could be nothing to prevent him from begetting a child on the boy's natural mother. Unless she is connected by blood with the adopter, sexual intercourse between the parties would not be incestuous. But when a man leaves permission to his wife to adopt, it is doubtful whether the widow can adopt her brother's son. Among English text-book writers there is difference of opinion on this point. Mr. Mayne is of opinion that the widow may lawfully adopt her brother's son. But Sir F. Macnaughten is against the validity of such adoption. These opinions are mere dicta unsupported by authority. I have already shewn that when a widow adopts, she does so in her own right, and not as agent for her husband. If that be the correct view as to the widow's position, then it follows that the widow cannot take in adoption the son of one who could not lawfully be appointed to raise issue on her. The question arose in the High Court of the North Western Provinces in the case of Musamat Batas Koor *v.* Lochun Singh, (7 N. W. P., H. C) and the Court set aside the adoption by the widow of her brother's son.

It is doubtful whether a widow can take her brother's son.

7. The boy to be adopted must not be the only son of his father.

An only son may not be taken.

The adoption of an only son is prohibited by the texts of Vasistha and Saunaka quoted in the last section. There is considerable difference of opinion as to whether these texts are directory or mandatory. It has been held by the High Court of Bengal that the adoption of an only son is invalid altogether. Raja Upendra Lal Roy *v.* Rani Prosunna Moyee, 1 B. L. R., 221; Manick Chandra Datta

v. Bhogubati Dasee, 3 I. L. R. Cal. p. 443. But the contrary has been laid down by the High Courts of Madras, Allahabad and Bombay (Chinna Gondun *v.* Kumara Gondun, 1 Mad. H. C. 54; Vyakut Row Nimbalka *v* Jayvant Row, 4 Bomb. H. C. 191; Hanuman *v.* Chirai, I. L. R. 2 All. 164.

From the mere wording of the texts and of the commentaries thereon, it is not possible to say which view is correct. In the case of Manik Chandra *v.* Bhogabati, it was contended that neither the Mimansa nor the Chandrika actually declares that the adoption of an only son is invalid. But Mr. Markby, who delivered judgment in the case, took a different view. The fact is, that the language of the commentators apparently supports either contention. Jagannath indeed says, "Let no man accept an only son, because he should not do that whereby the family of the natural father becomes extinct; but this does not invalidate the adoption of such a son actually given to him." But Jagannath has not been as yet accepted as an authority by the native Pundits; and considering the palpable errors which abound in his work, it is very doubtful whether he will be ever accepted as an authority. His book may be used as a compendium, but his opinion on doubtful points is not entitled to be regarded as authoritative. Even admitting the authority of Jagannath generally, his opinion on the point under consideration seems to be founded entirely on a misconception. Jagannath is primarily responsible for the erroneous notion which has prevailed so long that the words वचनशतेनापि वस्तुनोऽन्यथा कर्तुमशक्तेः in para 30, chap. II of the Dayabhaga are equivalent to the doctrine of *factum valet.* I have shewn in another place how utterly erroneous that interpretation is; and the application of the doctrine to matters relating to adoption is altogether unwarranted and unsupported by authority.

The decisions of the several High Courts of India being conflicting, the question can be settled by the Privy Council alone Although the point has arisen in so many cases before the several High Courts, yet it appears that it has never been argued in such manner as to lead to any satisfactory result. In Thakooranee Sahiba *v.* Mohan Lal, 11 M. I. A., p. 386 the Privy Council observed that the Hindu Law contains within itself the principles of its

exposition. But the principles and rules of interpretatic are not discussed in the books usually referred to thos actually concerned in the administration of law; and it i no wonder that conflicting rulings are laid down even i regard to points about which there can be no difference o opinion.

With regard to the point under consideration, it should be borne in mind that a prohibitory precept implies that either out of natural inclination, or on account of a more general rule, the act would be done, but for the prohibition. If it be conceded that the father has no right of property in his son, then the father could not give the son in adoption, in the absence of a precept of law. The texts which authorize the giving of a son in adoption, must be, therefore, regarded as precepts or विधि and not as अनुवाद or unnecessary statement of an established fact. If it be admitted that the father's right to give is derived from texts only, then it can be easily shewn that the prohibition regarding the giving of an only son is an अनुवाद or recitation of an established fact. Saunaka says, that "a man having many sons may give in adoption." From this it is necessarily implied that a man who has not many sons cannot give. Such being the case a man who has many sons can give in adoption; but one who has not many sons cannot give in adoption, because the right to give being derived from texts, the right cannot extend beyond the limits prescribed by texts. See page 58 *ante*.

If, however, it be held that the father's right to give follows from his proprietory right, then the texts which declare his right to give would be अनुवाद; and the texts, which forbid the giving of an only son, may, in that case, be regarded as mere moral precepts. But it is not proper to adopt a construction which makes a rule of law an अनुवाद Then again the modern Hindu jurists are agreed as to the father not having right or power of absolute disposition over his son; and the contention that the father's right to give follows from his proprietory right can never be accepted by the wise and the good. (See texts quoted in vv. 5, 14, sec. 4, Dattaka Mimansa. See also para. 67, chap. II of the Dayabhaga).

8. The validity or otherwise of the adoption of one who is the eldest son of his father depends upon considerations similar to those referred to above. There is no text directly prohibiting the adoption of one who is the eldest son of his father. Nor is there anything in the Chandrika or Mimansa against such adoption. There is, however, an express prohibition in the Mitakshara (Mit. Chap. I, sec. II, pp. 11, 12). It has been held by the High Court of Bengal that the prohibition is admonitory and not mandatory (Janaki *v.* Gopal, I. L. R., 2 Cal. p. 365)

Eldest son not to be taken.

9. An only son can be taken in adoption as a Dwaymushyana on the ground *cesante ratione cessat et ipsa lex* (Dattaka Chandrika, sec. I, paras. 27, 28.)

Dwaymushyana.

10. A man who has one son, but has grandsons and great-grandsons by predeceased sons can give his surviving son in adoption.

SECTION IX.

MAXIMUM LIMIT OF AGE OF THE BOY TO BE ADOPTED.

With regard to the maximum limit of age of the boy to be adopted, the following texts of Kalika Purana are quoted with approval in the Institutes of Raghu Nandana and in the Dattaka Mimansa.

* दत्ताद्या अपि तनया निजगोत्रेण संस्कृताः ।
आयान्ति पुत्रतां सम्यगन्यबीजसमुद्भवाः ॥
पितुर्गोत्रेण यः पुत्रः संस्कृतः पृथिवीपते ।
आचूडान्तं न पुत्रः स पुत्रतां याति चान्यतः ॥
चूडाद्या यदि संस्कारा निजगोत्रेण वै कृताः ।
दत्ताद्यास्तनयास्ते स्युरन्यथा दास उच्यते ॥
ऊर्द्धन्तु पञ्चमाद्वर्षात् न दत्ताद्याः सुता नृप ।
गृहीत्वा पञ्चवर्षीयं पुत्रेष्टिं प्रथमं चरेत् ॥

Text of Kalika Purana.

Raghu Nandana makes no remark or comment with reference to this text; but the author of the Mimansa deduces from it the following conclusions :

Accepte by Raghu Nandana and Nand Pandita.

---

* As the text is variously interpreted it is not possible to translate it.

(1.) The relationship of father and son is created by the due performance of the initiatory ceremonies.

(2.) A boy for whom none of the initiatory ceremonies have been performed by his natural father is most eligible for adoption.

(3.) A boy for whom the initiatory ceremonies prescribed before *chudra* have been performed, but whose *chudra* has not been performed may be taken in adoption, though one whose initiatory ceremonies have not been performed is preferable.

(4.) A boy whose *chudra* has been performed by his natural father, but whose age does not exceed five years, may be taken in adoption, but he would be a Dwaymushyana or son of two fathers.

(5.) A boy whose age exceeds five years cannot be adopted at all.

The author of the Chandrika refuses to accept the authority of the text.

The author of the Chandrika refuses to accept the text of Kalika Puran as authentic. But accepting it as authentic, for argument's sake, it does not follow, in his opinion, that the relationship of father and son is created by the performance of initiatory ceremonies. The author contends, with much force, that if the initiatory ceremonies be regarded as the cause which creates the relationship of father and son between the adopter and adopted, then a boy under five years being duly taken would not yet be able to perform the funeral ceremony of the father, if he dies before completing the initiatory ceremonies up to *chudra*. (Dattaka Chandrika, sec. II, para. 26)

Chandrika's interpretation of it.

The author of the Chandrika also shews that if the initiatory ceremonies up to *chudra* are already performed by the natural father, then there is no reason why they should be repeated. The initiatory rites are required for

(1) Removal of the taint of seed and blood.

(2) For regeneration.

To the extent that these objects are already attained, it would be perfectly superfluous to perform them over again.

From the following text of Manu :

गोत्र रिक्थे जनयितु न हरेद्दत्रिमः सुतः ।
गोत्र रिक्थानुगः पिण्डो व्यपैति ददतः स्वधा ॥

it appears that the adopted son's connection with the natural father, is severed by his being given in adoption. The adopted son's connection with his natural father being cut off from the date of giving, the adopter must perform those ceremonies which fall due after that date, because there is a text which requires that the father must perform the initiatory rites of the son. The adopter must perform also such of the previous ceremonies as had not been performed by the natural father; but those that are already performed need not be repeated.

The author of the Chandrika then shews that the word Chudradya in the text of Kalika Puran does not mean ceremonies commencing with *chudra;* but that it means ceremonies preceded by *chudra.* This interpretation is adopted in order to establish harmony with the following text of Vasistha:

अन्यशाखोद्भवो दत्तः पुत्रश्चैवोपनायितः ।
स्वगोत्रेण स्वशाखोक्तविधिना स स्वशाखभाक् ॥

It is ultimately shewn that there is no absolute limit of age; but that the boy to be adopted must be of such an age that the *chudradya* ceremonies may be performed by the adopter in the principal season, in accordance with the text of Vasistha quoted above. If the adoption is made after the expiration of the primary season, then the adopter cannot subsequently perform them; for the relationship of father and son being wanting at the primary season, the subsequent adoption cannot vest him with the right to perform them

According to the Chandrika, *chudradya* means investiture in the case of the twice-born; and marriage in the case of Sudras. The primary seasons for investiture with the sacred thread are as follow:

For Brahmins,	the limit is	7	years	3 months.
,, Khatrias	,, ,,	10	,,	,,
,, Vaishyas	,, ,,	11	,,	,,

If the investiture is already performed by the natural father then the boy cannot be taken in adoption; nor can the boy, whose primary season for investiture is passed, be taken; for the relationship of father and son being wanting between the adopter and the adopted at the primary season, the adopter cannot, after taking, perform the ceremony.

The conclusion at which the Chandrika arrives.

According to the Chandrika therefore the primary season for Upanayana is the limit of age for adoption among the twice-born classes. Among Sudras a boy can be adopted at any time before marriage.

Necessity of Putreshti.

Preference is to be given to a boy under five years. For if a boy whose age exceeds five years is adopted, his sonship is established, not by adoption only, but by Putreshti Jag, and by the performance of initiatory ceremonies. According to the reading, adopted in the Chandrika, the text of Kalika Purana prescribes, that when a boy whose age exceeds five years is adopted, the Putreshti Jag should be celebrated In commenting on the text, the author of the Chandrika says, "Since a person of the three first tribes only is competent to perform this, by such person, the filial relation must be completed through the rites of tonsure and the rest, preceded by a sacrifice for male issue. But, by a Sudra the same even, (is produced) through the rite of marriage alone. Thus the whole is unimpeachable. (Chandrika, sec. II, para. 32.)

From what is stated in the para. quoted above, it appears that the adoption of a boy under five years is preferable; and that if a boy whose age exceeds five years is adopted at all, then his sonship is not created by adoption only, but by the performance of Putresthi Jag and the celebration of the initiatory ceremonies.

The doctrine of the Chandrika accepted in Bengal and Madras.

In Bengal and Madras the rules laid down in the Chandrika have been accepted as law. In the North West the Mimansa is reckoned as of paramount authority; and the adoption of a boy more than five years old, would be illegal there, though in one case it was held by the Sudder Court of Agra that the limit of age is the sixth year. (Thakoor Omrai Singh *v.* Thakooranee Mahtab Kuar, 2 Agra Rep. 103)

In the Punjab and in the Bombay Presidency there is no limit as to age.

SECTION X.

THE CEREMONIES WHICH MUST BE OBSERVED IN ADOPTING.

The ceremonies necessary to an adoption are briefly described in the following text of Vasistha:

पुत्रं प्रतिग्रहीष्यन् बन्धूनाहूय राजनि निवेद्य निवेशनस्य मध्ये व्याहृतिभिर्हुत्वा अदूरबान्धवं बन्धुसन्निकृष्टमेव प्रतिगृह्णीयात्।

Vasistha.

["A person being about to adopt a son should take an unremote kinsman; having convened his kinsmen, and announced his intention to the king, and having offered a burnt-offering with recitation of the prayer denominated Vyahriti in the middle of his dwelling.]

From this, and from the fuller account of the ritual contained in the texts of Gotama, quoted in Section V of the Mimansa and in Section II, of the Chandrika, it appears that in order to take a boy in adoption—

Necessary ceremonies.

(1.) The adopter must convene his kindred.

(2.) Announce his intention to the king. ✗

(3.) Perform the Hom.

(4.) Must present himself personally before the giver, and beg of him that the boy may be given.

(5.) Must take the boy by the hand and utter the prescribed mantras.

(6.) Must decorate the boy with clothes and ornaments and make him over to his wife.

(7.) Must perform the Putreshti Jag in certain cases.

There can be no doubt that in order to render an adoption valid, the natural parents must give and the adopter must accept; for this follows from the definition of an adopted son. But the question is, how far the ceremonies prescribed by the Shastars are essential. As in marriage, so in adoption it is of the greatest importance that ceremonies should be considered essential. The performance of ceremonies not only secures publicity; but the preparation gives time for deliberation; and thus any hasty or imprudent step, which would not be approved by the public, is avoided. But Hindu lawyers never resort to such utilitarian reasoning; though generally they arrive at the same result in a different way.

It is a principle of Hindu law that an invisible result cannot be produced by a visible cause. The creating of filial relationship between strangers is an invisible result; and it cannot be brought about except by mantras and ceremonies prescribed by the Shastars. The essential ceremonies must therefore be observed. An incidental ceremony like the feeding of Brahmins may be omitted; but the principal ceremonies must be observed. An accidental error or omission would not vitiate the proceeding; all that is required is a substantial compliance. Such being the case, the Mimansa and the Chandrika expressly declare that the filial relation is not established unless the ceremonies are duly performed. (Dattaka Mimansa, paras 50, 56; Dattaka Chandrika, sec. II, para. 17, sec VI, para. 3.)

The High Court of Madras held in one case that the Datta Hom is an unessential ceremony (Singamma *v.* Venkatu Charlu, 4 M. H. C p 165). But the High Court of Calcutta has decided that, among the three superior classes, the Datta Hom is an essential ceremony (Lutchman *v* Mohun Lal, 16 W R. 179).

The Bombay High Court has decided that in the case of an adoption of a brother's son no ceremonies are required on account of an express text of Yama to that effect. Haibal Rao *v.* Gobind Row, 2 Bor. 75, 87. From this it is implied that, in any other case, ceremonies are essential. Upon the whole, it is now generally accepted that, among the three superior classes, ceremonies must be observed. (Behary Lal Mullick *v* Indra Moni, 22 W. R. 285, 5 I. L R. 770.) From the judgments of the High Court and the Privy Council it will appear that the Dattaka Mimansa and the Dattaka Chandrika have been mainly relied upon, for the position that, in the case of Sudras, ceremonies are not essential. In para. 27, sec. I of the Mimansa, it is stated that, in the case of females, mantras may be dispensed with, on account of the rule that "females and Sudras have no right to utter mantras." But it is not stated that the Hom may be dispensed with. On the contrary, the words होममन्त्रादिप्राप्तौ shew that the Hom must be first formed. That the Hom may be performed, on behalf of a female, by the priest is distinctly stated in para. 24. In the concluding part of para. 27,

it is stated that a female may take a boy in adoption in the same manner as any other chattel, without the utterance of mantra. From this it seems to be inferred that Hom is not necessary; but such an inference would hardly be justifiable, in the face of the express mention of the necessity of Hom in the same para. It is also to be noted that what Nanda Pandita actually says is, that the gift including acceptance would be valid without mantra; but he does not say, that the relationship of father and son can be created without Hom.

Then with regard to the passage of the Chandrika, upon which the High Court relies, it is to be observed that it has no reference whatever to the ceremony of adoption. The passage in question is nothing but a commentary on the last of the slokas of Kalika Puran quoted in the preceding section. The plain meaning of the text, according to the reading adopted in the Chandrika, is that when a boy above the age of five years is adopted, the Putreshti Jag should be performed first. But the Chandrika says, that when the boy taken is above the age of five, then the relationship of father and son is created by the performance of Putreshti and Sanskara. In the case of Sudras who have no right to perform the Putreshti, the relation is completed by Sanskara only. The author of the Chandrika thus makes the first Sloka of Kalika Puran applicable only to the case of Sudras. But he does not say that no ceremonies are required in the case of Sudras.

It thus appears that neither the Chandrika nor the Mimansa contain any express or implied authority for the position that, in the case of Sudras, the Hom may be omitted. Apart from authorities, it must be admitted that, on the general principles of Hindu Law, the relation of sonship cannot be created without some invisible cause. Mere gift and acceptance may produce visible result. The dominion of the natural father may be divested in favour of the adopter thereby; but the filial relation cannot be created by visible causes.

Ceremonies being declared unessential among Sudras, it follows by parity of reasoning that, even among the twice-born classes, ceremonies need not be observed when an adoption is made by a female. When the receiver and the giver are both females, the case is still stronger. According to the Mimansa, a female can adopt without

mantras; but it seems that the Hom cannot be omitted. There is a text which authorises the omission of mantras when the adopter is a female or Sudra, but there is no authority whatever for omitting the Hom which must therefore be performed by the priest.

In marriage the necessity of Hom is maintained by Raghunundun and other authoritative writers, even where the parties are Sudras. By parity of reasoning, it follows, therefore, that ceremonies are essential and necessary in the case of adoption by Sudras.

It has been held that, in the case of Sudras, no ceremonies, except the giving and taking of the child, are necessary to an adoption. (Indra Moni Choudrani *v.* Behari Lall Mullik, I. L. R., 5 Cal. 770). But the giving and taking, in such an adoption, ought to take place by the father handing over the child to the adoptive mother or father, and such giving or taking cannot be completed by the execution of mutual deeds (Shoshee Nath Ghose *v.* Krishna Sunderee, (I. L. R., 6 Cal. p. 381.)

Section XI.
INFORMAL ADOPTION.

When a boy is given in adoption, his connection with his natural father ceases. Manu says:

गोत्ररिक्थे जनयितुर्न हरेद्दत्त्रिमः सुतः ।
गोत्ररिक्थानुगः पिण्डो व्यपैति ददतः स्वधा ॥

If the adoption is illegal and void, then there is no reason why the boy should lose his status, in his own family. It is true that there are texts which declare that the informally adopted son becomes the slave of the adopter. But that is because, in ancient times, the father had a sort of dominion over the son; and when the father gave his son to another, the son became either the slave or son of the person to whom he was given. But in these days, slavery is not only illegal, but practically unknown; and the informally adopted son would not, in any case be the slave of the person to whom he is given. Even supposing that, by informal adoption, the boy becomes the slave of the person to whom he is given, still it does not follow that he would lose his right to the Gotra or heritage of his natural father, or be incapable of giving

Pinda to him. It is only the properly adopted son, whose right to the Gotra and heritage of his natural father is extinguished from the date of his adoption, under the text of Manu quoted above. But the position of the boy who is not properly adopted, remains the same. There are texts which declare that an informally adopted son is entitled to maintenance and marriage expense. But it does not follow from those texts that the boy's connection with his natural father is severed.

When a widow adopts without authority, the adoption is void altogether, and does not create any change in the status of the boy (Bhowani Sunker *v.* Ambubai, 1 Mad. H. C. 363; Sremutty Raj Coomaree *v.* Naba Coomar Mullik, 1 Boul 137). In the latter case, however, Colville, C. J. observed: "It has been said on one side and denied on the other, that a Dattaka or son given would forfeit the right to inherit to his natural father, even though he might not, for want of sufficient power, have been duly adopted into the other family. This proposition seems to be contrary to reason, but for all that, may be very good Hindu Law But, from the enquiries we have made, we believe the true state of the law to be this. There may undoubtedly be cases in which a person, whose adoption proves invalid, may have forfeited his right to be regarded as a member of his natural family. In such a case, some of the old texts speak of him as a slave entitled only to maintenance, in the family into which he was informally adopted. But one very learned person has assured me, that the impossibility of returning to his natural family depends, not on the mere gift or acceptance of a son, but on the degree in which the ceremonies of adoption have been performed; and that there is a difference in this respect between Brahmins and Sudras. A Brahmin being unable to return to his natural family, if he has received the Brahminical thread in the other family; the Sudra, if not validly adopted, being able to return to his natural family, at any time before his marriage in the other family. Even if it be granted that a person, merely because he is a Dattaka, or son given, apart from the performance of any further ceremony, becomes incapable of returning to his natural family, that would not govern the case of an adoption, that was invalid because the widow had not power to

adopt. For to constitute a Dattaka, there must be both gift and acceptance. A widow cannot accept a son for her husband unless she is duly empowered to do so, and therefore her want of authority, if it invalidates the adoption, also invalidates the gift."

From what is stated in the extract quoted above, it seems to be implied that where there is a valid giving and taking, but in consequence of some formal defect the adoption is invalid, then the boy cannot return to his natural family, after the initiatory ceremonies are performed. The learned Chief Justice says that this *dictum* is based on the opinion of a very learned person. But it is difficult to find any clear authority for such an inequitable rule. It seems that even if the ceremonies of Upanyana or marriage are performed in the family of the adopter, still the informally adopted boy would not lose his rights in the family of his natural father. It is true that, in such a case, the adoptive fathers and his ancestors would be mentioned as the ancestors of the boy in the mantras which require such reference; it is true that in the Bridhi Sradh which must precede Upanyana and marriage, the ancestors of the adoptive father and mother would be worshipped. But that would not create any change in the status of the boy. As for the Bridhi Sradh it is only an incidental ceremony; and its total omission does not affect the validity of the principal ceremony As for the mention of the names of the adoptive father and his ancestors in the essential mantras, even that would not affect the validity of the ceremony, any more than error in pronunciation. The ceremony of Upanayana performed by the adoptive father would, it seems, be valid as if done by a volunteer priest.

Section XII.

RIGHT OF A PROPERLY ADOPTED SON TO INHERIT AS HEIR TO HIS ADOPTIVE PARENTS AND THEIR RELATIONS.

A son cannot be taken in adoption by a person who has an Aurasa son living. But if an Aurasa son be born after adoption, the adopted son takes a third share or a fourth share, according to the following text of Katyana:

उत्पन्ने त्वौरसे पुत्रे तृतीयांशहराः सुताः ।
सवर्णा असवर्णास्तु ग्रासाच्छादनभागिनः ॥

The share of an adopted son in cases where an Aurasa is born after adoption.

In the Chundrika, the reading is तृतीयांश (see v. para. 16). But in the Mitakshara, the reading is चतुर्थांश (Mit Chap. I, sec. XI, para. 32). Although these different readings are capable of being reconciled, yet it is now settled that in Bengal an adopted son takes one-third of the whole; and the subsequently born Aurasa takes two-thirds. In the provinces governed by the Mitakshara, the adopted son takes one-fourth of the whole. In Madras and Bombay, the adopted son takes a fourth part of the share of an Aurasa; so that where there is one adopted and one Aurasa, the whole estate is divided into five shares of which the adopted son takes one. Where there are several Aurasa sons, the shares vary according to the principle adopted. If there be two after-born Aurasa sons, then the estate would be divided into five shares in Bengal, into seven shares in Benares, and into nine shares in Madras and Bombay, the adopted son taking one share in each case.

If there is only one adopted son, he takes the whole estate of the adoptive father But it was, for a long time, an open question, whether the adopted son can inherit as heir to the relations of his adoptive father and mother. It has been already seen that of the several kinds of sons mentioned in the texts quoted in p. 108 the first six inherit as heirs to kinsmen; but the last six do not inherit collaterally. Whether the adopted son inherits as heir to kinsmen is a question as to which it is not possible to give a satisfactory answer. In certain texts the adopted son is included in the first set, but in certain other texts he is included in the last set. The Dattaka Chandrika as usual tries to make all the passages harmonise, by saying, "In the same manner the doctrine of one holy saint that the son given is an heir to kinsmen—and that of another that he is not such an heir—are to be reconciled by referring to the distinction of his being endowed with good qualities or otherwise" and concludes the controversy by saying that wherever a legitimate son would succeed to the estate of a brother or other kinsman, the adopted son will succeed in the absence of such legitimate son. The Mitakshara follows Manu who places the adopted

among the first class of sons, and makes him a general, and not merely a special heir, while the author explains the conflicting texts as being founded on the difference of good and bad qualities (Mit. chap. I, sec. 11, paras. 30—34). Jimutavahana does not quote any text, but mentions the names of the secondary sons in the order in which they are enumerated in Devala's text; so that, according to the Dayabhaga, the adopted son is included among the last six of secondary sons.

llateral ship of adopted

The right of an adopted son to inherit as heir to his adoptive father's kinsmen, was recognized in some very early cases. In Sambhu Chandra *v* Narayani, (1 S. D. 209), it was held that an adopted son is entitled to inherit as heir to another adopted son In another case, it was held that an adopted son is entitled to succeed to the estate of his adoptive father's brother (Lokenath Roy *v.* Shama Soonderee, S. D. of 1858). In a later case the adopted son was held entitled to share in the property of one who was first cousin to his grandfather by adoption (Tara Mohun *v.* Kripa Moyee, 9 W. R 423). In the latter case, it was also held that the adopted son takes exactly the same share as a legitimate son, when he is sharing with other collateral heirs who are not the legitimate sons of his adoptive father.

The right of the adopted son to inherit *ex parte maternâ* was long open to question; and has been finally settled by the recent case of Kali Kamal Majumdar *v.* Uma Sankar Moitra 6 I. L R. 256.

The adopted son of a disqualified member of a family does not take any share (Mitakshara, Chap. II, sec. X, para. 11; Chandrika, sec. VI, para. 1.)

Section XIII.

SUIT FOR SETTING ASIDE AN ADOPTION.

'eriod of nitation.

Under the law of limitation now in force, a suit "to obtain a declaration that an alleged adoption is invalid or never in fact took place" must be brought within six years from the time "when the alleged adoption becomes known to the plaintiffs, (Act XV of 1877, sch. II, Art. 118).

Under Act IX of 1871, sch. II, Art. 129, the period was 12 years from the date of adoption or the date of the adoptive father's death. The alteration in the law was made to meet such cases as that reported in 4 B L. R., F. B. 3. In that case the ancestor died leaving a widow who adopted a son in 1824 and survived him till 1861. In 1866 the suit was commenced by the daughter's son of the ancestor alleging that the adoption was invalid. It was admitted that the adopted son and his son, the then defendant, had been in possession since 1824. It was decided by a Full Bench, that the statute did not begin to operate till the death of the widow.

As the law now is, a reversioner may bring a suit for setting sside an adoption which had taken place long before his birth. If the plaintiff sues not to set aside the adoption, but simply as next heir, to recover the property on the death of the widow, it seems likely that he would have 12 years from the death of the widow, provided the possession of the adopted son or his heirs was not adverse to that of the widow.

Court Fee.

In a suit to set aside an adoption the plaint must be on a stamped paper of the value of Rs. 10, (Act VII of 1870, Schedule II, No. 17).

Presumption.

In a suit for setting aside an adoption, the presumption would either be in favour of, or against it, according to the circumstances of the case If the adopter is a wealthy man, if he is too old or sickly, the presumption would be in favour of the adoption. It was on such consideration, that the Privy Council decreed the claim of an adopted son, in a case in which the Provincial Court and the Sudder Court held that the adoption was not proved. The suit was brought by one Haradhun Mookerjee who alleged himself to be the adopted son of one Ghanesham Mookerjee. The defendant Golak Chundra who, as brother of Ghanesham, was in possession of the property, denied the adoption and set up a deed of gift in his favour. The evidence for, and against the allegation of the plaintiff was nearly equally balanced; and, under the circumstances, the Privy Council ruled "that much must depend on the probabilities of the case, to be collected from those facts as to which both parties are agreed." Their Lordships then proceeded to observe as follows:

"The adoption of the appellant is alleged to have

taken place in the autumn of 1824. At this time, it is clear, that Ghanesham was advanced in years, about sixty-seven years old, that he had two wives to whom he had long been married, by neither of whom he had ever had issue, and both of whom were of such an age as to make it, in the highest degree, improbable that he should ever have by them a son of his body. He seems, long before this period, to have despaired of having such issue, for 18 years before, he had adopted a boy called Banee Madho, the son of his brother Goluk Chundra, In April 1824, Banee Madho had died without issue. These are facts about which there is no controversy."

"According to the religious texts of the Hindus a man's state, after death—his deliverance from a place of suffering called Put depends upon his leaving a son to perform certain rites and ceremonies after death."

"That these opinions were shared by Ghanesham is clear from the evidence, and he had acted in conformity with them, by the adoption of Banee Madho Is it then more probable that on Banee Madho's death he should supply his place by the adoption of another son, or that he should deliberately incur the penalty which, according to his opinion, would attend the omission to discharge this duty." 4 M. I. A. p. 414.

A suit for setting aside an adoption cannot be brought by one who, by his conduct, is estopped from bringing such a suit. If a man by his own behaviour encourages another to believe that he has not the right which he really possesses, or that he has waived that right, or if by representation or acts he induces another to enter upon a course which he would not otherwise enter on, or leads him to believe that he may enter on that course with safety, then he is not afterwards allowed to assert any rights which are inconsistent with or infringed upon by that new state of things which he himself has been influential in bringing about (Sadasiv Moreshwar Ghote v. Hori Moreshwar Ghati, 11 Bomb H. C. Rep. 190). The law as to estoppel is now contained in section 115 of the Evidence Code.

Neither the statute of limitation nor the law of estoppel can make a person an adopted son, if he is not one. They can secure him in the possession of certain rights which would be his, if he were adopted, by shutting the mouth of

particular men if they deny his adoption. But if it becomes necessary for the person who alleges himself to have been adopted, to prefer a suit to enforce rights of which he is not in possession, he would be compelled strictly to prove the validity of his adoption, as against all persons except those who are precluded from disputing it.

It used to be held, at one time, that a decision in favour of an adoption is *primâ facie* evidence of the fact of the adoption, even as against persons who were not parties to the suit. But it is now settled by the decision of a Full Bench "that a decision by a competent Court that a Hindu family was joint and undivided, or upon a question of legitimacy, adoption, partibility of property, or upon any other question of the same nature, in a suit *inter partes*, or more properly speaking in an action *in personem*,—is not a judgment *in rem* or binding upon strangers." (Kanya Lal *v.* Radha Charan, 7 W. R., 338; Jogendra Dev *v.* Funindra Dev, 14 M. I. A., 367) It was also laid down by Peacock, C. J., in his judgment in the Full Bench case referred to above "that a decree in such a case is not and ought not to be admissible at all as evidence against strangers." According to the decision of the Bengal High Court in Gujju Lal *v.* Futeh Lal, I L. R., 6 Cal., 171, a judgment *inter alios*, as to matters not of a public nature, is not admissible as evidence either as a "transaction" under s. 13, or as a "fact" under s. 11, of the Evidence Code.

Not a judgment in rem.

The reason for the ruling laid down in Kanai Lal *v.* Radha Charan is to be found in the following extract from the judgment delivered by Peacock, C. J., in the case:

"If a judgment in a suit between A. and B. that certain property for which the suit was brought belonged to A. as the adopted son of C. were a judgment *in rem* and conclusive against strangers as to the fact and validity of the adoption, the greatest injustice might be caused. For instance, suppose that a Hindu, one of four brothers, should be entitled to a separate estate consisting of a large zemindary, yielding an annual profit of two lacs of rupees, and also of a small piece of land in a distant zemindary, and that, upon his death, without issue and without leaving a widow, the surviving brother as his heir should enter into possession and sell the small piece, and that afterwards a person claiming to be the adopted son of the deceased brother should sue the purchaser in

the Munsiff's Court to recover the land so sold, upon the ground that, he being the heir by adoption, the brothers of the deceased had no right to sell it. The purchaser might be a poor man without the means of procuring or paying for the attendance of the necessary witnesses, or of making a proper defence to the suit, and the claimant, without any collusion, might succeed in establishing the alleged adoption, and recover the land. Now, if this judgment were a judgment *in rem*, and conclusive against the brothers as to the status created by the alleged adoption, in a suit brought against them for the zemindary, they could have no means of defending their possession, however clearly they might be able to prove that there was no foundation whatever in support of the claim of adoption." 7 W. R., p. 339.

SECTION XIV.

RESULT OF ADOPTION BY A FEMALE.

The estate vested in the widow is divested in favour of the child adopted by her

When a widow takes a child in adoption, her right to her husband's estate is divested at once in favour of the adopted child. (Dharam Das *v.* Sama Soonderee, 3 M I. A., 229.) It is difficult to find any clear authority for this result either in the texts or in the commentaries. The case of a posthumous son is not altogether similar. For the posthumous son being actually in the mother's womb at the time of the father's death, the estate never vested in the widow. Nor can it be said that, by taking a child in adoption, the widow virtually abdicates her right in favour of the son adopted. For, if that be the ground on which the widow is divested of her right, then where there are several widows, the son adopted by one cannot acquire any right to the share of the others, until their death. But it has been held that the son adopted by one of two widows becomes owner of the entire estate, from the date of adoption. (Rakma Bai *v.* Radha Bai, 5 Bom., 181.) The true ground seems to be that the widow and the rest succeed only to the estate of a sonless man, and that when a child is adopted, the existence of such child destroys the kind of right which a female can have in the estate of her husband. (Dayabhaga, chapter XI, sec. I, para. 27.)

It has been already shewn that when a widow takes a child in adoption, she does so in her own right, and not as agent for her husband. The *anumati* in such cases is

not anything amounting to an order which must be obeyed; it is nothing but sanction. But it has been laid down in several cases, that a widow can adopt only as agent for her husband, (Chowdry Pudum Sing *v.* Koer Oody Sing, 2 P. C. J. 447). This view is not supported by any authority, and is not consistent with the rulings laid down in Bamun Das *v.* Tarinee, (7 M. I. A. 169) and in Ram Soonder *v.* Sarvani, (22 W. R.).

In the former case, it was laid down that (1) a widow who has *anumatipatra* from her husband to take a child in adoption, is not bound to do so.

(2) That so long as a child is not actually taken in adoption, the widow is the owner of her husband's estate.

From the date of adoption, the widow is divested of the right which vests in her, at the date of her husband's death. In countries governed by the Mitakshara law, the widow does not inherit as heiress to her deceased husband, if he was a member of a joint family, at the time of his death. When a member of a joint family dies, then, according to the Mitakshara, his right to the joint family property is extinguished, from the moment of his death; and the surviving members become the sole owners, as if there never existed any such person as the one deceased. It has been held that the son subsequently adopted by the widow would take the place of his father like an Aurasa son born after the father's death (Sri Raghunanda *v.* Sri Braja Kishore, 3 I. A. 154.) According to the Mitakshara the son, grandson and great-grandson of the members of a joint family become co-owners from the moment of their birth or adoption as the case may be; and the fact of the birth or adoption taking place after the father's death, would not make any difference in the position of the child. The subsequently adopted child would become a member of the joint family, from the date of adoption; and would be entitled to a share on partition.

Mitakshara joint family.

When a widow, having authority to that effect, takes in adoption a second child, after the death of the previously adopted son without issue, it is open to question whether the second adopted child becomes the owner of the property at once. In relation to the last full owner, the second adopted child stands in the position of a brother. But as a natural brother, living at the time of the death of the last owner, would not inherit before the mother, so

it can hardly be said that the son, subsequently adopted by the mother, would be in a better position than a son born of her womb, (Rama Swamy *v.* Venkatu Ramin, 6 I. A. But see Boikunt Money Kishen Soonder, 1 W. R. 392.

If the first adopted child leaves a widow, then that widow takes the estate as heiress to her deceased husband; and the son subsequently adopted by the mother of the last owner, would not take anything until the death of the widow and the mother. If the widow of the first adopted son has permission to adopt, and in pursuance thereof takes a child in adoption, the estate would vest in that child, and the son adopted by the mother of the last owner would take nothing. The same result would take place if the first adopted leaves a daughter or daughter's son who is a nearer heir than a brother. The leading case with reference to this point is that of Ram Kishore *v.* BhoobunMohiny (10 M. I. A. 279). The facts of that case were as follow: Gour Kishore a zemindar in Bengal died, leaving a widow Chundra Bali, and a son Bhowani. Previous to his death, he executed a document whereby he gave permission to his wife to adopt a son, in the event of failure of her issue. Bhawani succeeded to the zemindary, married, came to age, and died leaving no issue, but a widow named Bhoobun Mohiny. Chandra Bali then adopted Ram Kishore who sued the widow of Bhowani for the estate. The Privy Council held that the plaintiff's suit must be dismissed, since his adoption gave him no title that was valid against Bhowani's widow. (10 M. I. A. 279.)

Ram Kishore v Bhoobun Mohini.

It has been held in a subsequent case that, upon the vesting of the estate in Bhowani's widow, the power of adoption, which his mother professed to exercise, was at an end and was incapable of execution (Padam Kumari Chowdrani *v* Court of Wards, I. L. R. 8 Cal. 302). If Bhowani's mother had the necessary sanction to adopt, it it difficult to see why the adoption by her after, Bhowani's death, should be invalid.

A son adopted by the step-mother of the last full owner cannot take his estate. So long as there is a step son, the step-mother cannot adopt at all; after the death of the step-son, the step-mother may adopt, if she is duly authorized to that effect. But at the death of the last full owner, the estate at once vests in the nearest Sapinda and the subsequently adopted son, who would stand in the

Son adopted by step-mother.

relation of brother to the last owner, can take nothing (Annama *v* Mabu Bali Redi, 8 Mad. H. C. 108).

It is now settled that adopted sons inherit as heirs to the collateral relations of their parents. But it is a fundamental principle of Hindu law that an estate cannot remain in abeyance; and that on the death of any person it must vest at once in the nearest heir at the time. It was accordingly held in the case of Kaly Prosunna Ghose *v.* Gocool Chandra Mitter that the son adopted by the nephew's widow could not inherit, as the adoption took place after the death of the last owner. The circumstances of the case were such that if the nephew's widow took the child in adoption, before the death of the owner, then that adopted son would have taken the estate as next heir, (2 I. L. R. 295).

Date from which the right of an adopted son originated.

The right of the son adopted by a widow dates from the time of his adoption. If the widow held the estate of her deceased husband as heiress to him, and made any alienation, or subjected it to any encumbrance without legal necessity, then the adopted son can claim to set aside the same, not on the ground that his right dates from the death of the adoptive father; but on the ground that alienations made and incumbrances created by a widow are voidable at the option of the next taker. The son adopted by a widow cannot sue her for accounts or mesne profits. This follows from the view which has been taken as to the position of the widow who adopts; and also from the ruling laid down in Bamun Das *v.* Tarinee, (7 M. I. A. p. 169.)

In a joint Hindu family governed by the Mitakshara, the son adopted by a widow cannot, it seems, sue for mesne profits, for the period intervening between the father's death and the date of adoption by the widow. The position of the son adopted by a widow, in a Mitakshara family, is at best that of a co-owner; and as such, he cannot sue his co-owners for mesne profits. He can at most sue for partition and separate allotment. It is doubtful whether, under the circumstances, the adopted son can sue to set aside an alienation made by the joint owners, before his adoption.

It has been held in Bombay, that if the parent of the boy, when giving him in adoption expressly agree with the widow that she shall remain in possession of the

property during her lifetime, and she only accepts the boy on those terms, the agreement will bind him as being made by his natural guardian (Chitko *v.* Janoki, 11 Bom. 199.)

But in a later case before the Madras High Court it has been held that a minor taken in adoption is not bound by the assent of his natural father to terms imposed as a condition of the adoption (Laksman Ram *v.* Laksmi Ammal, 4 I. L. R. Madras, p. 160.)

An adoption *pendenti lite* is not regarded in the same light as an alienation *pendenti lite.* The adopted son is not bound by the decree unless he is made a party to the suit after his adoption. Rambhat *v.* Laksman, I. L. R. 6 Bom. p. 630.

Section XV.

KRITRIMA SON.

The Kritrima form of adoption prevails only in Mithila. Nanda Pandita recognizes it as legal notwithstanding the text of Adita Purana which declares that in the present age all the secondary sons have become obsolete with the exception of the Dattaka (see Mimansa, section II, para. 65). The Kritrima adoption is unknown in practice, except in the Mithila country. The definition of the Kritrima son is to be found in the text quoted in page 108.

The Kritri-ma form of adoption pre-vails only in Mithila.

The consent of the adopter is necessary to an adoption in the Kritrima form; and the consent must be given in the lifetime of the adoptive father (Lutchmun *v.* Mohan Lal, 16 W. R. 179).

There is no limit of age. The initiatory rites need not be performed in the family of the adopter; and the fact that these rites are already performed in the natural family is no obstacle (Shiboo Koeri *v.* Jagun Sing, 8 W. R. 155).

Who may take and who may be taken.

Any person may be adopted who is of the same tribe, whatever may be the nature of the relationship existing between the adopter and the adoptee.

As regards succession, the Kritrima son does not lose his rights in his natural family. He takes the estate of

his adoptive father only, but not that of his father's father or other collateral relation, nor of the wife of his adoptive father (Shiboo *v.* Joogu, 8 W. R. 155).

In the Kritrima form the relationship of father and mother is limited to the contracting parties; and the son of the Kritrima does not take any interest in the property of the adopter (Jaswunt Sing *v.* Dooly Chand, 25 W R. 255).

A woman can take a son in the Kritrima form, either during her husband's life or after his death. If a woman adopts a Kritrima son, he stands in the relation of son to her only; and he does not become the adoptive son of her husband, unless he is taken jointly by the husband and the wife. If the husband adopts one, and the wife adopts another, then each stands in the relation of son only to the party by whom he is adopted; and the son of the one cannot give Pinda to the other, nor can he take his estate. (Sree Narain *v.* Bhya Jha, 2 S. D. 23; Collector of Tirhoot *v.* Hara Pershad, 7 W. R. 500).

No ceremonies necessary.

No ceremonies or sacrifices are necessary to the validity of a Kritrima adoption. The form to be observed is this. At an auspicious time, the adopter having bathed, addressing the person to be adopted who has also bathed, and to whom he has given some acceptable chattel, says, "Be my son." He replies "I am become thy son."

CHAPTER V.

JOINT FAMILY AND JOINT OWNERSHIP.

SECTION I.

ABSOLUTE AUTHORITY OF THE GRIHAPATI IN PRIMITIVE TIMES.

1. In primitive times, when there was no sovereign power, or when the authority of the sovereign power was not sufficiently established, the father's power over his children must necessarily be unrestricted. Almost all the ancient societies were, therefore, organized on the patriarchical model. The power of the Grihapati or patriarch was supreme within his own household. To the society collectively he was responsible for the good conduct of those under his control; but within the family circle, his power was unlimited, except so far as it was softened by natural affection.

2. Though we do not possess any history, in the proper sense of the term, yet our scriptures and ancient codes of law contain ample evidence that the patriarchical system prevailed among the ancient Aryas, as in every other country, in those times. The Vedas disclose a state of society in which the power of the Grihaputi was supreme within his household, though it does not appear that the power of the Hindu Grihapati was ever as great as that of a Roman father. There is nothing to show that Hindu fathers ever claimed to exercise the power of life and death over their children.

power Griha- an- mes.

3. Among the Romans, in early times, the father had power of life and death over his children; he could chastise them as he liked; he could modify their presonal condition by selling, or giving them in adoption; he could give a wife to his son; he could give his daughter a hus-

'atria s of ians.

band; he could divorce his children of either sex; he could appropriate their earnings as he liked. Whether, in practice, a Hindu father ever claimed to exercise such powers, it is not possible to know at present; but there can be no doubt that the written codes of Hindu law never gave such unlimited powers to him.

The power of the Hindu father over his children was much greater than it is now.

4. Though the Hindu Legislators never gave to the Hindu father such extensive powers as the Patria Potestas of early Roman Law, yet there was a time when the power of the Hindu father over his children was greater than it is now. Manu says—

भार्य्यापुत्रश्च दासश्च त्रय एवाधनाः स्मृताः ।
यत्ते समधिगच्छन्ति यस्यैते तस्य तद्धनं ॥

Manu VIII, 415.

This text shews that the Hindu father was at one time entitled to appropriate to himself the earnings of his children, as also of his wife and slaves. Later commentators explain away this passage, in some manner or other; and allow the son to retain, for his own use, his self-acquired property. But, even at the present day, a son who would not place his earnings at the disposal of his father is considered as wanting in filial duty.

5. A Hindu father never had power of life and death over his children He can give them in adoption even now; and there are indications in the shastars that, at one time, he could sell them. Of the several kinds of secondary sons enumerated in the Shastars, one is a son bought from parents Vashistha says " Man produced by virile seed and uterine blood, proceeds from his father and mother as an effect from its cause; therefore his father and mother have power to give, to sell, or to abandon their son" (Dattaka Mimansa, sec. IV, p. 14). But there are contrary texts also. (See Dattaka Mimansa, sec. IV, paras. 5 and 6) Modern commentators reconcile these texts by saying that a son cannot be sold, without his consent, which amounts to nearly the same thing as saying that a son cannot be sold at all Notwithstanding the prohibition of Shastars, the sale of little children by their parents is not altogether unknown among the lower classes of Hindus. But the sale of grown-up children has not the sanction of law or usage; and it does not seem likely that the practice ever existed, in ancient times.

6. In respect of the marriage of his children, the power of a Hindu father was, in all probability, much the same that it is at present. The father chooses the bride or bridegroom; and presides at the marriage ceremony. But he does so, more as a matter of duty, than as a matter of right. Sometimes the father abuses his power by selling his daughter to an old or illiterate bridegroom. Such cases are happily rare now; but, in ancient times, it seems that the Asura was the prevailing form of marriage.

7. The patriarchical form of a family can remain, in its full force, only so long as the founder of the family lives. As soon as the father dies, the children would all aspire to be independent; and by dint of ability alone, the eldest among them can then command the respect and obedience of the others. In the primitive condition of society, the power of the karta would be in some cases quite as great as that of the father. There are indications in the Codes that, at one time, the eldest brother took the whole estate and the others lived under him. Manu says—

ज्येष्ठ एव तु गृह्णीयात् पित्र्यं धनमशेषतः ।
शेषास्तमुपजीवेयुर्यथैव पितरं तथा ॥

Manu C. IX *v.* 105.

Gautama says:—

सर्व्वं वा पूर्व्वजस्य इतरान् बिभृयात् पितृवत् ।

Gautama 28-3.

In a country where there is neither political nor commercial activity the ... family system under a strong Govt.

But the Hindu Legislators look upon the family property as a fund for the maintenance of members; and they could not do otherwise than recognize the right of the members to demand partition, and to claim equal shares. The junior members were therefore very often led to assert their independence; and even if they held together, the power of the karta was reduced to that of a responsible manager. Thus under a strong Government, the patriarchical system naturally tended towards that joint family system which still prevails in Hindu society. The Brahmin legislators never allowed the exercise of such extravagant powers as were claimed by parents in ancient Rome. They placed the power of the father within such limits, that his duties outweighed his powers; and instead of being the absolute master, he came to be looked upon as

the responsible manager of the family republic. Thus the patriarchical system gave way to the joint family system in Hindu society.

8. The joint family system must be unknown in countries where there is scope for political ambition, and where the people are actively engaged in the pursuit of arts, manufacture or commerce. The individual who has governed provinces or commanded armies cannot feel much interest in managing the petty affairs of a joint family; far less would it suit him to submit to the authority of a karta or patriarch.

Political and commercial activity bring individuals into prominence.

9. An individual, who lives abroad for years, either in pursuit of arts, manufacture or commerce or in discharging the duties of a public officer, must lose that attachment for the family circle which is essential to the existence of the joint family system. When such an individual finds that he is earning more money than the other members of the family, he naturally feels inclined to make such arrangement that his own children may have exclusive possession of his separate acquisitions. This is another powerful cause which leads to the disintegration of the joint family, in a progressive and politically free country.

10. The progress of the industrial arts operates in several ways to bring individuals into prominence. On the one hand, it enables some individuals to earn much more than others. On the other hand, the wants of life multiply with the progress of the industrial arts, and men of wealth then feel more inclined to enjoy the new luxuries, than to devote their surplus income to the support of dependants. In primitive times, men of wealth took a delight in having about then a large number of relatives to support But, in a society where there is scope for activity, every one tries to acquire his livelihood by his own exertions. And all these circumstances combined tend to the dissolution of the joint family and to bring individuals into prominence.

Section II.

THE JOINT FAMILY.

1. From what has been already stated, it will appear that the patriarchical system, which prevails in the primitive condition of society, is followed either by the joint family system, or by individual independence according to circumstances. Among the Hindus, the joint family system still prevails, though the process of disintegration is going on, side by side, for centuries. It has been shewn already that the causes which lead to the dissolution of the joint family, and towards bringing individuals into prominence are twofold :—

1. Scope for political ambition.
2. Progress in the industrial arts.

2. It is not within the scope of this work to show why these causes have not been sufficiently powerful amongst us to lead to the complete dissolution of the joint family system. Suffice it to state here that the country being too vast and the population too heterogenous, the people of the different parts of the country were never united politically; and for this reason the country has ever been a prey to foreign invasions, and the regular channels for political ambition were as few as possible. A few adventurous spirits played very successfully in the political sphere; but such cases were extremely rare. Men gifted with the power of leading the people, found it generally much safer to wield their influence within the limits of their native village, or to set themselves up as reformers or founders of religious sects professing to give up all connection with the world, so as to acquire a higher position than even kings and emperors. The state of things, during the period of Mahomedan rule, was much the same that it was in the time of Hindu kings, the only difference was that, in the Courts of the Mahomedan kings, very few could flourish without turning converts to Mahomedanism. With the downfall of the Mahomedan empire, India has become subject to a foreign country, and constituted as the Government of the country now is, the natives of the soil are practically excluded from the higher appointments of the public service; and the subordinate appointments that are open

to them are too insignificant and too few in number to produce an appreciable effect on the constitution of society.

3. Then with reference to the second of the two causes mentioned above, it is to be observed that though some of the arts and manufactures attained a very high degree of perfection, yet, as a general rule, there were few industries in the country which required combination of labour or the investment of any large amount of capital at a time. The arts and manufactures of India were domestic industries. In the villages the carpenter, the weaver, the blacksmith, the potter and the baker supplied the local wants. The market was generally an extremely limited one; and the village people or the landlord had very frequently to subsidize them by grants of rent-free land, or by assigning a share of the annual produce of the soil, to enable them to practice their avocation. Such a state of things was more favourable to the conservation than the destruction of the joint family system.

4. There being thus very few industries in the country which required any combination of labour and capital, there were very few towns in India. Where the kings or their agents held their Courts, there was a town population, as also in the holy places of pilgrimage. But such towns were few, and the population too small to afford any considerable scope for the skill of the artists. There was a demand in these towns for some costly manufactures; and some few people waxed rich. But their number was too few to exercise any influence on the country.

Causes of India's poverty.

5. At the present time, the country is intersected by roads, railways, canals, &c.; and life and property are as nearly secure as possible. But the ancient industries of the country are ruined; and as the entire surplus production of the soil is taken away to foreign countries, the native inhabitants of the country cannot have capital enough to take advantage of the inventions of modern science, and to drive from their markets the manufactures of foreign countries But for this circumstance, towns would spring up in every part of the country, and the individuals in active pursuit of wealth would become the unit of society.

6. Whatever may be the cause, the joint family system still prevails in the country. Those who possess any

ancestral property generally live together under the paternal roof; for so long as they do so, they are treated by the people about them with that respect which they can never hope to enjoy by setting up separate establishments In the present state of the country, very few individuals can acquire an amount of importance which can make it advantageous for him to live separately. By continuing undivided, the members of an ancient house possess all the strength of union; but by separating or by residing elsewhere than under the paternal roof, they lose all their hereditary position and power. It is only when the state of feeling among the members of the joint family becomes such as to render joint living impossible, that partition takes place. In European countries, the sons of the same parent separate quietly as soon as they begin to earn their living. But amongst us, the descendants of a common ancestor not unfrequently live together for generations, even when there is little or no family property beside the family dwelling-house; and separation very seldom takes place without actual misunderstanding, except where an individual, in the course of public or private service, or in pursuit of trade, lives abroad in a distant place for years.

ıe members joint milies very ldom separate without isunderstanding.

SECTION III.

JOINT OWNERSHIP.

Joint family property regarded as a fund for the maintenance of the members.

Ownership is therefore supposed to be acquired by birth and extinguished by death.

1. According to Hindu lawyers, the joint family property is to be regarded as a fund for the support of members and dependants of the family. At a time when it was not unusual for the descendants of a common ancestor to live together for generations, it is but natural that every living member should regard himself as having a vested interest in the joint family property. When such was the case, it must also seem that the right of the several members arises by birth, and is extinguished by death. Accordingly the sage Gautama says—

उत्पत्त्यैवार्थं स्वामित्वं लभेत

And Vijyaneshwar lays down that ownership is acquired by birth (Mitakshara, chap. 1, sec I, p. 23).

Nature of the right acquired by birth.

2. The right to ancestral property, which is thus created by birth, is an inchoate right including—

(1). Right to maintenance while the family remains joint.

(2). Right to demand partition.

There are texts which declare that the son has co-equal rights with the father in respect of ancestral property. Jagnyavalkya says—

भूर्य्यापितामहोपात्ता निबन्धो द्रव्यमेव वा ।
तत्र स्यात् सदृशं स्वाम्यं पितुः पुत्रस्य चोभयोः ॥

Dayabhaga, chap. II, para. 9; Mit. chap. I, sec. V. p. 3.

Vyasa says—

स्थावरं द्विपदञ्चैव यद्यपि स्वयमर्ज्जितं ।
असम्भूय सुतान् सर्व्वान् न दानं न च विक्रयः ॥

[Though immoveables or bipeds have been acquired by a man himself, a gift or sale of them *should* not *be made* by him without convening all his sons. See Dayabhaga, chap. II, para 29, Mitakshara chap. I, sec. I, para 27.]

These texts are the logical consequence of the doctrine that a son by birth becomes a co-owner with his father in the family property.

Considerations which led to the adoption of the theory that ownership is by birth.

3. Apart from texts, there were also very important considerations which rendered the adoption of the above theory, as to the origin of ownership in joint family property, absolutely necessary. If it be held that the right of the sons originates from the date of the father's death, then in order to effect a partition, it becomes necessary to ascertain the dates of birth and death of all the descendants of the common ancestor; and even when all that is ascertained, it is exceedingly difficult to determine the shares of the several living members.

4. Vijyaneshwar, therefore, adopted the theory that right to ancestral property is acquired by birth, and is extinguished by death To effect a partition on this principle, all that it is necessary to know is the nature of the relationship between the living coparceners.

Objections to the theory ownership by birth.

5. The doctrine that right to ancestral property is acquired by birth is open to the objection that it does not apply to collateral succession. When a man dies separate leaving no male issue, and his collaterals succeed as heirs

to his property, it cannot be said that the right of such collateral heirs arose from the date of their birth. In such a case, there is no other alternative than to say that the right of the collateral heirs arose at the time of the death of the owner. Vijyaneshwar says that the right of a collateral heir is liable to obstruction; and the collateral cannot therefore acquire any interest until the death of the proprietor. But it is not consistent with the principles of Hindu Law to account for the same result in two different ways It is not proper to say that right of the heir arises by birth in some cases, and by death of the last owner in others.

Circumstances which lead to the adoption of the opposite theory.

6. However that be, the early sages laid down that sons by birth acquire equal rights with the father in the ancestral property; and Vijyaneshwar could not do otherwise than accept the doctrine. But the circumstances which gave countenance to it, in ancient times, ceased to exist in many localities. With the progress of society, joint living for generations becomes rare, and sons generally separate within a short time after the death of the father. This state of things prepares the minds of men for the theory that the paternal estate vests in the sons after the death of the father. The doctrine of joint ownership of sons is so embarassing to parents, that the opposite view is readily accepted, as soon as it is shown to be in accordance with the Shastars. When, therefore, Jimuta showed that it is possible to explain away the texts which apparently support the theory of ownership by birth, his doctrine was at once accepted in that part of the country to which apparently he belonged.

The joint ownership theory of Vijyaneswar and the distinct co-sharership theory of Jimutavahana flow from their respective theories as to the origin of ownership in ancestral estate.

7. It has been already stated that, according to the Mitakshara, sons acquire ownership in the paternal estate, from the date of their birth; but that, according to the Dayabhaga, sons do not possess any interest in the paternal estate, so long as the father lives. Such being the doctrine of the two leading authorities as to the origin of ownership, it must be obvious that their conception of joint ownership must be materially different. According to the theory adopted by Vijaneshwar, the right of the newly born son must cover the very same ground that was previously covered by the right of the father alone. At the time when the son is born, there cannot be necessarily any vacant ground. If the father dies just at the time when the son is born,

then the right of the son would at once take the place occupied by the father alone during his lifetime. But in all other cases, the right of the son must extend over all that property which is also owned by the father. The necessary consequence of this doctrine is, that the father and the son become co-owners in the family property; but they cannot be called co-sharers. For they have no fixed share in the property. When a partition takes place, then the shares are ascertained for the first time. But until partition the co-owners can have no definite share; for by births and deaths in the family, the extent of their interest must be continually fluctuating In Appovier *v.* Ram Subbayau, (11 M I. A. 75) Lord Westbury observed that "according to the true notion of an undivided family in Hindu Law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share." This is a necessary consequence of the theory of ownership by birth.

Nature of the joint ownership theory of Vijyaneswar

8. As already observed the right of a coparcener in a Mitakshara family is an inchoate right, including—

(1) Right to maintenance while the family remains joint.
(2) Right to demand partition.

All the coparceners being jointly interested in the whole property, no individual can make a sale or gift of any portion of it, except for family purposes. According to Hindu Jurists, ownership implies power of absolute disposition. But where there are several persons jointly entitled in the same thing, it must be obvious that that thing cannot be sold or otherwise disposed by any single co-owner.

9. According to Jimutavahana the right of the son arises when the father dies, *i e*, at a time when there is a vacancy. Jimutavahana is, therefore, at liberty to say that the rights of the several heirs to a deceased person do not cover the same ground; but that the right of each co-heir covers only a part of the property. The share of each co-heir is known and vested before partition; by partition nothing more is done than the assigning of a portion of the family property to each co-sharer, according to the extent of his share. Such being the conception

The distinct co-sharership theory of Jimutavahana.

of joint ownership in the Dayabhaga, any co-sharer can, according to it, sell or give away his share without the consent of the others; and if any co-sharer dies, before partition, he is still succeeded by his legal heirs. His interest is extinguished, but his share is taken by the heirs, and not by the surviving coparceners, unless they are the heirs. The distinction, between the joint co-ownership theory of Vijyaneshwar and the distinct co-shareship theory of Jimutavahana, is of the greatest importance in the Hindu Law of Inheritance. The circumstances which led to the adoption of these opposite theories have been already explained. The importance of these theories with reference to the law as to alienation of the shares of joint owners, and as to the law of succession will appear hereafter, when I come to deal with these topics. Vijyaneshwar is called सामुदायिकस्वत्ववादी; and Jimutavahana and his followers are called प्रादेशिकस्वत्ववादी. The reader would do well to remember these distinctions.

The grounds on which Jimuta rejects the joint co-ownership theory of Vijyneshwar.

10. Jimuta rejects the theory of Vijyaneshwar on the ground that it would necessitate the assumption of a great deal more than is absolutely necessary, *viz.*, that joint ownership is extinguished, and distinct ownership is created by partition. This sort of reasoning may not appear conclusive to English lawyers; I refer to it only to illustrate the mode in which Hindu jurists argue legal questions

11. So far as collateral succession is concerned, Vijyaneshwar was at liberty to adopt the distinct co-ownership theory. But Vijyaneshwar does not say anything as to the nature of the right of collateral heir. His idea evidently is, that co-owners cannot have distinct shares before partition.

12. The succession of sons, grandsons and great-grandsons is called *unobstructible succession* in the Mitakshara; and collateral succession is called *obstructible* succession. The right of a son cannot be obstructed; it is therefore a vested right. But the right of a collateral may be obstructed by the birth or adoption of a son to the last owner; it is, therefore, contingent and not vested being liable to obstruction.

SECTION IV.

ANCESTRAL PROPERTY.

The distinction between ancestral and self-acquired property.

1. The distinction between ancestral and self-acquired property is of very great importance in Hindu Jurisprudence, especially in the schools which accept the Mitakshara as the leading authority. It is, therefore, absolutely necessary that the distinction between the two classes of property should be clearly marked.

2. All property which a man inherits from a direct male ancestor is ancestral property. The word in the original is पैतामह which literally means property coming down from paternal grandfather. In the text quoted in page 157. Jajnyavalkya says that the son has equal right with the father in property acquired by grandfather. In commenting on that text Vijyaneshwar says—"The grandson has a right of prohibition if his unseparated father is making a donation or sale of effects inherited from grandfather: but he has no right of interference if the effects were acquired by the father. On the contrary he must acquiesce because he is dependent. Consequently, the difference is this, although he have a right by birth in his father's and his grandfathers' property, still since he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property; but since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction, if the father be dissipating the property." (Mit. chap. I, sec. V, pp. 9 and 10). Practically therefore the father has absolute power over his self-acquired property; but in respect of ancestral property, his sons possess equal rights with him. Such being the law, according to the Mitakshara, the distinction between ancestral and self-acquired property is of great importance.

Unobstructed heritage ancestral property.

3. That property to which a man acquires a vested interest by birth, is called Apratibandha Daya or unobstructible heritage; and in relation to the son of the man who acquires such a vested interest by birth, the property is regarded as पैतामह or ancestral.

Obstructed heritage is self-acquired.

4. Property which comes into the hands of the heir as obstructed heritage from a collateral kinsman is not regarded as ancestral property, (Nanda Coomar *v.* Moulvie Rajeeodeen, 10 B. L. R. 1837, Lochan Sing *v.* Nem Dharee, 20 W. R. 170).

5. The self-acquired property of the grandfather becomes ancestral property in the hands of the father, (Ram Narain *v.* Pertum Sing, 20 W. R. 189).

Savings and profits of ancestral property regarded as parts thereof.

6. All savings made of ancestral property and purchases or profits made from the income or sale of ancestral property follow the character of the fund from which they proceeded. (Sadanand Mahapatter *v.* Bana Malee Das, 6 W. R. 256; 8 W. R. 455; 11 W. R. 466).

Unobstructed heritage is regarded as ancestral property even after partition.

7. Property which comes into the hands of undivided coparceners from a common ancestor continue to be ancestral even after partition. Adur Mony *v.* Chowdry Shib Narain kur, I. L. R. 3 Cal. p. 1.

If ancestral movable property be converted into immoveable property then it is regarded as ancestral immoveable property.

8. Moveable property which comes into the hands of a descendant, and is converted by him into immoveable property is regarded as ancestral immoveable property. In the case of Sham Narain *v.* Roghu Bor Dyal, (I. L. R. 3 Cal. 508). Mr. Justice Kennedy observed "I do not know of any authority which shows that the meaning of an ancestral immoveable estate is an ancestral estate which has descended in an immoveable form. I am inclined to think that it includes any ancestral estate no matter whether it descends in moveable or in immoveable form."

Property given by the grandfather to the father is ancestral property in the hands of the father.

9. Property given to the father by his father is regarded as ancestral property in the hands of the father (Madun Gopal *v.* Ram Baksh, 6 W. R. 71). The word in the original is *paitamah*, which literally means any property derived from the grandfather. If it comes to the hands of the father as a gift and not as a heritage, it is still पैतामहं. This is the ground on which I would put the above ruling.

If the ancestral estate is improved it is still ancestral.

10. If the common estate is improved it is still considered as ancestral, for Jajnyavalkya says—

सामान्यार्थे समुत्थाने विभागस्तु समः स्मृतः ।

[But if the common stock be improved an equal division is ordained].

Property purchased with money borrowed on the security of ancestral property is ancestral.

11. Property purchased with money borrowed on the security of ancestral property is considered ancestral. (Shib Pershad *v.* Kullunder, 1 S. D. 76.)

12. A distinct property acquired by a member of a joint family with but slight aid from joint funds, is liable to partition, but the acquirer takes a double share. (Sreenarain v. Gooroo Pershad, 6 W. R. 219, Shiv Dyal v. Jodu Nath, 9 W. R. 61). But whether such property is to be considered as ancestral or self acquired is a question about which there is no clear authority. Vijyaneshwar says "that whatever is acquired at the charge of the patrimony, is subject to partition. But the acquirer shall, in such a case, have a double share, by the text of Vashitha—

A distinct property acquired by a single co-owner with but slight assistance from joint funds.

येन चैषां स्वयमुपार्जितं स्यात् स द्व्यंशमेव लभेत।

(Mit. chap. I, sec. IV, para. 29).

[He among them, who has made an acquisition, may take a double share]. I do not find any authority on the point. It seems to me that at the least the extra share which the acquirer obtains as such ought to be regarded as self-acquired.

13. Where a man obtained a share of the family property, on partition, which had been mortgaged to its full value, and which he had subsequently cleared from the mortgage by his self-acquisition, it was held that the unencumbered property was ancestral property in his hands (Visalatekee v. Anuaswami, 5 Mad. H. C. 250).

Ancestral property being cleared from debts by the father is still ancestral.

14. An impartible Raj may be joint family property, though from its very nature it can be enjoyed only by one member at a time (Katama Natchiar v. Shivagunga, 9 M. I. A. 539).

Impartible Raj.

SECTION V.

SELF-ACQUIRED PROPERTY.

Whatever is acquired by any member of a joint family, without detriment of the joint family property, is reckoned as the self-acquired property of that member. According to the Dayabhaga all kinds of self-acquired property belong exclusively to the acquirer; and are not liable to partition. But, according to the Mitakshara, only certain descriptions of self-acquired property are exempt from partition. This difference between the two leading authorities, is due to a difference in the interpretation put upon a text of Jajuyavalkya which will be discussed in the Chapter on Partition.

Self acquired property

Certain descriptions of self-acquired property liable to partition according to the Mitakshara.

2. Although certain descriptions of self-acquired property are liable to partition according to the Mitakshara, yet there can be no doubt that the power of alienation of the acquirer is the same with respect to all descriptions of self-acquired property, until partition takes place. Where Vijyaneshwar says that the father has absolute power over his self-acquired property, he has not made any saving in favour of any particular description of self-acquired property; and because certain descriptions of self-acquired property are liable to partition, it by no means follows that over those particular kinds of self-acquired property, the father's power is as limited as it is in respect of ancestral property.

3. Property acquired by the joint labour of coparceners, without detriment of ancestral wealth, is reckoned as joint family property and is liable to partition. Vrihaspati says—

समवेतैस्तु यत् प्राप्तं सर्व्वे तत्र समांशिनः ।

(Mit. chap. I, sec. IV, para. 15.

But such property must be absolutely at the disposal of the acquirers; and their sons can have no right to prohibit the sale of such property, unless the acquisition was made by the labour of the sons also.

Self-acquired property may become joint family property by being thrown into the common stock.

4. Property which was originally self-acquired may become joint family property, if it has been voluntarily thrown into the common stock, with the intention of abandoning all separate claims upon it. Where one of five brothers laid the foundation of the fortune of the family, and afterwards with his four brothers jointly carried on trading business, it was held that the acquirer of the capital, with which trading business of the family was started, had thrown the same into the common stock; and all the brothers were entitled to equal shares in the wealth of the family. (Ram Pershad *v.* Shib Charan, 10 M. I A. p. 490.)

5. When there are two coparceners, and property is acquired by the labour of a single coparcener, but with the aid of capital belonging to both, then, according to the Daybhaga, the acquirer gets a double share (Dayabhaga, chap. VI, sec. I, para. 24).

6. The above rule is deduced from reason. But it is also supported by the text of Vyasa; and it seems that

the acquirer can get a double share only where the property acquired is a distinct one, and of considerable value compared with the amount of joint funds employed.

7. There is a conflict of rulings as to how far the gains of science are divisible. The question will be discussed in the Chapter on Partition It is not possible to say, on the present state of authorities, whether in respect of such gains of science as are partible, the power of the father is limited or unlimited. If the circumstances be such that the acquirer is entitled to a double share, then the property may be regarded as self-acquired and alienated, though in the absence of any authority, directly on the point, it is not possible to say what the law should be.

Ancestral property recovered by a single member of an undivided family.

8. Where ancestral joint family property is wrongfully seized by a stranger; and one of the co-heirs recovers the same by his own exertions, unaided by joint funds, the recoverer is reckoned as sole owner. The recovery by one coheir, for his own benefit, is permissible " where the neglect of the other coparceners to assert their title had been such as to shew that they had no intention te recover it, or were at least indifferent as to its recovery (Visalatchy *v.* Annasamy, 5 Mad 150.)

9. As to the result of such recovery there is an apparent conflict in the Mitakshara. At chap. 1, sec. V, para. 11, Vijyaneshwar referring to the following text of Manu makes the recovered property belong exclusively to the recoverer.

Apparent conflict between Manu and Sankha not reconciled in the Mitakshara.

पैतृकं तु पिताद्रव्यमनवाप्तं यदाप्नुयात् ।
न तत् पुत्रैर्भजेत्सार्द्धमकामः स्वयमर्ज्जितं ॥

Manu IX, v. 209.

The text of Manu apparently refers to recovery by father, and that of Sankha to the case of recovery by any other coparcener.

Jimuta reconciles the text in a different manner.

At Chap. I, sec. IV, para. 3, a text of Sankha is quoted as establishing that if it be land, the recoverer takes a fourth part first of all; and the remainder is equally shared by all. It is not unlikely that the text of Manu refers to the case of recovery by a father; while that of Sankha lays down the law, where the recoverer stands in any other relation to the other coparceners. According to Jimutavahana, the father is the absolute owner of ancestral property, so long as he lives; and he therefore says that the word father in the text denotes any coparcener. (Dayabhaga, Chap. VI, sec. 2, para. 36.) Having adopted this interpretation of the text of Manu, Jimuta reconciles

it with that of Sankha by saying that the former lays down the general rule; but the latter lays down a special rule as regards land.

rden of f where question whether property undivided ly pro- y or the acquired erty of member.

When a Hindu family lives in commensality and possesses some joint property, the presumption is that all the property, of which the members are in possession, is joint estate; and the burden of proving that any part of such property is separate or self-acquired lies upon the person who alleges that it is so (Dharm Das Panday *v.* Shama Soonderi, 3 M. I. A. 229). Whether in order to raise this presumption in respect of acquisitions it must be admitted or proved that there was a nucleus of joint property from which such acquisitions would have been made, or the presumption arises from the bare fact of the family being joint, is a question upon which there is some apparent difference of opinion. The reader may refer to the cases quoted and commented on in Field's Commentary on the Evidence Code, section 114. The question is not one of Hindu law; and I therefore refrain from discussing or passing any opinion with reference to it. The leading cases on the point are Tarak Chandra Poddar *v.* Joheshwar Chandra Kundu 11 B. L. R. 193: 19 W. R. 178; Dhunuk Dhari Lal *v.* Ganput Lal, 11 B. L. R. 201; Dinanath Shaw *v.* Harinarain Shaw, 12 B. L. R. 349; Govinda Chandra Mookerjea *v.* Durga Pershad Babu, 22 W. R. 248.

SECTION VI.

THE POSITION OF THE KARTA IN A JOINT FAMILY.

Mitak- law.

1. It has been already stated that, according to the Mitakshara, sons acquire a right in their father's property from the date of their birth; that the father in a Mitakshara family cannot sell or alienate ancestral immoveable property without the consent of his sons except for purposes in which the whole family is interested; and that, in respect of self-acquired property and ancestral moveable property, the father has larger powers. The law on this subject will be more fully discussed hereafter.

2. Although, according to the Mitakshara, sons acquire a right by birth in the father's wealth, yet they can only

sue for partition; but they cannot sue him for mesne profits or accounts. If the joint family property be under the management of an elder brother or an uncle as karta a suit for mesne profits would not lie. A suit for an account may be brought against the father or any other karta, in order to know how the business is being managed. (Abhoy Chandra Roy *v.* Pyari Mohun, 5 B. L. R. 34.) So long as the family remains joint, the members are only entitled to maintenance; they cannot sue the karta for their respective shares in the surplus income. (Sadanand *v.* Bonomalee, 6 W. R. 256)

Dayabhaga law.

3. In Bengal sons do not by birth acquire any right over the father's property; and during his lifetime they can neither sue for mesne profits nor for partition. While they are minors, they can claim to be maintained; but that is a right which is independent of the possession of any property by the father. Where there is ancestral property, the grown up sons have a moral right to be maintained. Whether the right is legally enforceable or not is not clear. The questin will be discussed afterwards.

4. Where an elder brother or an uncle is the manager of the joint family, his position is much the same according to the Dayabhaga and the Mitakshara A manager of a joint family is not like an agent or trustee. He is not under any obligation to economise or to save; nor is liable for damages for want of skill. If any member be dissatisfied with the management, his only remedy is by partition. The manager in certainly bound to refund any sum which he actually misappropriates; where the coparceners are minors, the position of a karta is that of a trustee; and he is bound, when his trust comes to an end, to account for the manner in which had discharged it. (Chackun Lal *v.* Poran Chandra, 9 W. R. 483)

5 Circumstances of necessity may justify a father or any other karta in disposing of any part of the family property. Vyasa says—

एकोपि स्थावरे कुर्य्याद्दानाधमनविक्रयान् ।
आपत्काले कुटुम्बार्थे धर्म्मार्थे च विशेषतः ॥

The karta can make any disposition.

In commenting on this text, Vijyaneshwar says, "While the sons and grandsons are minors and incapable of giving their consent to a gift or the like; or while brothers are so, and continue unseparated; even one per-

son who is capable may conclude a gift or hypothecation; or sale of immoveable property, if a calamity affecting the whole family require it; or the support of the family renders it necessary; or indispensable duties such as the obsequies of the father or the like make it unavoidable." (Mit. chap. I, sec. I, para. 29.) From this passage it seems that the karta can make a sale or hypothecation or gift of the family property, in certain cases of necessity by his own authority, if the coparceners are minors. It has been held in one case that the consent of those who are of age cannot be dispensed with even where the transaction is for the benefit of the family (Mathura *v.* Bootin Sing, 13 W. R. 30). The contrary, however, was held in other cases (Jagernath Das *v.* Doobo Misser, 14 W. R 80; Bishumbher *v.* Sadashib, 1 W. R 96). The question is therefore undecided still (Soraj Bunsee *v.* Seo Pershad, 5 I L. R. p. 165).

Coparceners who are minors are bound by his acts.

There is conflict of rulings as to whether the karta can make any disposition without the consent of the adult coparceners.

6. It has been held "that persons carrying on a family business, in the profits of which all the members of the family would participate, must have authority to pledge the joint family property and credit for ordinary purposes of trade." (Johura Bebee *v* Sree Gopal Misser, I. L. R. 1 Cal. 470; Ram Lal Thakarsidass *v* Lakmi Chand, 1 Bom. 51). In such cases, it seems that the karta may deal with the joint family property, even though the other members be adults; and if the coparceners be minors, the karta may exercise greater powers than he can do in any other case.

The case of coparceners who carry on trade or business for the benefit of the family.

7. As a general rule, the power of a karta to deal with the estate of his minor coparceners is a limited one. The leading case on the point is that of Hanuman Pershad Panday *v.* Babooe Munraj Koer (6 M. I. A., 393.) That was the case of a mother managing as guardian for an infant heir. A father, and head of the family, might have greater powers, but could not have less, and it has been repeatedly held that the principles laid down in that judgment apply equally to the father, or other joint owner, who manages the joint family property. In the case of Hanuman Pershad Panday their Lordships observed—"The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu Law, a limited and qualified power. It can only be exercised rightly in case of need, or for the benefit of the

Power of the karta to deal with the interest of minor coparceners.

estate. But where, as in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. Their Lordships think that the lender is bound to enquire into the necessities of the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting, in the particular instance, for the benefit of the estate. But they think that if he does so enquire, and acts honestly, the real existence of an alleged, sufficient, and reasonably credited necessity, is not a condition precedent to the validity of his charge, and they do not think that under such circumstances he is bound to see to the application of the money." (Hanuman Pershad Panday *v.* Babooe Munraj Koer, 6 M. I. A. 393).

8. The case before the Privy Council was one of mortgage and not of sale. But it is evident that the same principles would apply in either case. A prudent manager should of course pay off a debt from savings rather than by sale of part of the estate (Musst. Bukshun *v.* Musst. Doolhin, 12 W. R., 337) and it might be more prudent to raise money by mortgage than by sale. On the other hand, where the mortgage is at high interest, it might be more prudent to sell than to renew (Mathura *v.* Bootun, 13 W. R., 30). In every case the question is one of fact, whether the transaction was one which a prudent owner, acting for his own benefit, would enter into. Where there are binding debts, which cannot be otherwise met, a sale will be justifiable to pay them off, even though there was no actual pressure at the time, in the shape of suits by the creditors (Kaihav *v.* Roop Sing, 3 N. W. H. C., 4). *A fortiori* of course such dealings will be justified when there are decrees in existence, whether *exparte* or otherwise, which could at any moment be enforced against the property (Parmeshwara *v.* Musst Goolbee, 11 W. R., 446; Sheoraj *v.* Nukcheda, 14 W. R. 72).

Effect of Act XL of 1858 on the power of the karta in a joint family

9. By sec. 2 of Act XL of 1858, it is provided that "except in the case of proprietors of estates paying revenue to Government who have been or shall be taken under the protection of the Court of Wards the care of

the persons of all minors, (not being European British subjects) and the charge of their property shall be subject to the jurisdiction of the Civil Courts. Section 3 of the Act provides that "every person who shall claim a right to have charge of property in trust for a minor under a deed or a will, or by reason of nearness of kin or otherwise, may apply to the Civil Court for a certificate of administration" and that "no person shall be entitled to institute or defend any suit connected with the estate of which he claims the charge, until he shall have obtained such certificate." The language of the Act leaves no doubt that the natural guardian is not required to take out a certificate unless the estate is large, and unless the guardian wants to prosecute or defend any suit on behalf of the minor. If the natural guardian takes a certificate from the Civil Court then, according to sec. 18 of the Act, he "may exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a minor, and may collect and pay all just claims, debts, and liabilities due to, or by the estate of the minor. But no such person shall have power to sell or mortgage any immoveable property, or to grant a lease thereof for any period exceeding five years without an order of the Civil Court previously obtained." But it is now settled that the powers of an uncertificated guardian are not affected by these provisions. (Ram Chandro Chackravarti *v.* Brojanath Majumdar, 4 I. L. R 929) The validity of a sale or mortgage or lease by a guardian, who has not taken out any certificate under Act XL of 1858, would depend upon the principles set forth in the Mitakshara, Chap. I, sec. I, para. 29, as explained in the judgment of the Privy Council in Hanuman Pershad's case.

Section VII.

THE POWER OF A HINDU FATHER GOVERNED BY MITAKSHARA TO DEAL WITH ANCESTRAL PROPERTY.

Father's power over moveables.

1. It has been already stated that, according to the Mitakshara, the sons become joint owners of the family property from the date of their birth. But in commenting on the following text:—

मणिमुक्ता प्रवालानां सर्व्वस्यैव पिता प्रभुः ।*
स्थावरस्य तु सर्व्वस्य न पिता न पितामहः ॥

Vijyaneshwar says, "It is a settled point that property in the paternal or ancestral estate is by birth (although) the father have independent power in the disposal of effects other than immoveables, for indispensable acts of duty and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress, and so forth; but he is subject to the control of his sons and the rest in regard to the immoveable estate, whether acquired by himself or inherited from his father or other predecessor" (Mit. chap. I, sec. I, para. 27.)

2. In another part of his work Vijyaneshwar says "the grandson has a right of prohibition if his unseparated father is making a donation or sale of effects inherited from the grandfather, but he has no right of interference if the effects were acquired by the father. On the contrary he must acquiesce, because he is dependent. (Mit. chap. I, sec. V, para. 9.)

3. The result is that, according to the Mitakshara, the father has absolute power over his self-acquired property, whether moveable or immoveable. As regards ancestral moveables, the father has certain powers given to him by special texts. But he cannot deal with ancestral moveables arbitrarily, in a manner not warranted by law, though he has greater powers over ancestral moveables than over ancestral immoveables. Accordingly, it has been held by the Bombay High Court, that where there are two undivided sons, the father cannot by his will bequeath the whole or nearly the whole of the ancestral moveable property to one of the sons. The Court observed—"It would be impossible to hold a gift of the great bulk of the family property to one son to the exclusion of the other to be a gift prescribed by texts of law" (1 I. L. R. Bom. 561.) The decision might have been put also on the ground that neither according to the Mitakshara nor according to the Dayabhaga, can a father disinherit a son by testamentary disposition of his property. This will be shewn in dealing with the law relating to Wills.

---

* Yajnavalkya cited in the Dayabhaga, Chap. 2, para. 22.

4. The father being the manager of the family concern, he must have certain latitude to deal with the ancestral moveables. It is accordingly declared—

पितृप्रसादाद्भुज्यन्ते वस्त्राण्याभरणानि च ।
स्थावरन्तु न भुज्येत प्रसादे सति पैतृके ॥
(Mit. chap. I, sec. I, para. 21).

But a father, according to the Mitakshara, cannot make a gift or sale of ancestral immoveable property, without the consent of his adult sons and grandsons If the sons or grandsons are minors, then the father can sell the ancestral immoveable property only for such necessary purposes as the suppprt of the family (Mitakshara, chap. I, sec. I, para. 29).

Sale of ancestral immoveable property by the father to pay his debts binding on the son.

5. Formerly, the sale of ancestral immoveable property by the father in a Mitakshara family, used to be set aside, at the suit of the son, unless it was shown that the sale was for necessary purposes. But in the case of Giridhari Lal *v* Kantoo Lal, the Privy Council held that a sale of ancestral property, by the father, for the purpose of paying his own debts is binding on the sons, unless the debt was of such a nature that it was not the duty of the son to pay it. The judgment is of great importance, and is quoted below *in extenso*

"This is a suit brought by Babu Kantoo Lal the son of Bhikaree Lal, and by Musamat Dolaro Koonwaree on behalf of Mahabeer Pershad, the minor son of Lalla Bajrung Sahaya, the said Kantoo Lal and Mahabeer Pershad being grandsons of Moonshee Kunhya Lal deceased, against a number of different defendants who are wholly unconnected with each other, to recover possession from them of certain portions of land which belonged to the ancestral estate. The first appeal arises out of the suit so far as it related to the first set of defendants, Babu Giridhari Lal and Ranjeet Pandey to recover possession of Talooka Nawa Gaman and Akha Amanut Sarcar in Pergunna Chayen, and to set aside a deed of sale which was executed by the fathers of the two plaintiffs, dated the 28th July 1856.

The fathers are both made defendants in the suit; and it is stated by one of the witnesses, and is probably the fact, that Bhikaree, the father of Kantoo Lal, is in reality

the person carrying on the suit. The suit was brought to set aside the deed of sale executed by the two fathers and to recover possession of the whole property, not the particular shares of the sons—even if the sons could be said, in a case like the present, to have had distinct and separate shares. The Principal Sudder Ameen dismissed the suit The High Court set aside that decision and awarded to the plaintiff Kantoo Lal one half of an 8-anna share; but as to the other plaintiff Mohabeer Pershad, the minor son of Bojrung Sahya they held that he was not entitled to recover, inasmuch as he was not born at the time when the deed of sale was executed. In respect of that portion of the decision no appeal has been preferred.

"The property is situated in the Mithila district, and is governed by the Mithila law which is very similar to the law administered under the Mitakshara. With reference to the Mitakshara upon this point, it may be well to read from the 11th Moore's Privy Council cases, p. 89, a portion of the judgment which was delivered by Lord Westbury in the case of Appovier *v.* Ram Subbyan before the Judicial Committee. He says: "According to the true notion of an undivided family in Hindu law, no undivided member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member has a certain definite share. No individual member of an undivided family could go to the place of receipt of rent, and claim to take from the Collector or receiver of rents a certain definite share. The proceeds of undivided property must be brought according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment of the members of an undivided family. But when the members of an undivided family agree among themselves, with regard to a particular property, that it shall thenceforth be the subject of ownership in certain definite shares, then the character of undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided."

"It is probable that on account of this case and on account of a decision in the High Court, (12 Wkly. Reporter, Full Bench Cases, p. 5) this suit was brought by Kantoo Lal and Mohabeer Pershad, not for the purpose of recovering their respective shares, because they had no distinct or definite shares to recover, but to recover the whole property upon the ground that the sale by the fathers was void, and that the whole property which the fathers had conveyed ought to be brought back again to be joint property for the benefit of the whole family. It is questionable whether a son can, under the Mitakshara law, recover an undivided share of ancestral property sold by his father. (12 W. R. 478). But it is unnecessary to determine that question in the present case because their Lordships are of opinion that, looking to the circumstances of this case, the plaintiff was not entitled to recover any portion of the estate as regards the first two defendants.

"It appears that the deed of sale was executed on the 28th July 1856. At that time a decree had been obtained against Bhikaree Lal at the suit of Byjnath Chuckerbaty upon a bond executed by Bhikaree in his favour, and an execution had issued against him, upon which his 'right and share' in the dwelling-house belonging to the family had been attached It was therefore necessary to raise money to pay the debt of Bhikaree Lal the father, and to get rid of the execution, whatever the effect of it might be.

"The property descended from Kunhya Lal, who died in the year 1250. The eldest of the two plaintiffs, Kantoo Lal was not born until 1251. So that upon the death of Kunhya Lal, the property descended to Bhikaree Lal and Bujrung Sahya as his two sons, and they were the only persons interested in the property at that time. There can be no doubt that if they had contracted a debt at the time, the property which descended to them from their ancestor would have been liable to pay it. But it is said that they could not sell the property because in 1251, before the deed of sale was executed, Kantoo Lal was born, and by reason of his birth, and the Mithila law, he had acquired an interest in his property.

"Now it is important to consider what was the interest which Kantoo Lal acquired. Did he gain such an interest in this property as prevented it from being liable to pay a

debt which his father had contracted? If his father had died and left him as his heir, and the property had come into his hands, could he have said that because this was ancestral property which descended to his father from his grandfather, it was not liable at all to pay his father's debts? In the case which has been referred to in argument of Hanoomand Pershad Panday v. Mussamut Babooe Munraj Koonweree, (6 M. I. A) Lord Justice Knight Bruce who delivered the judgment of the Privy Council, says at page 421:—"Though an estate be ancestral it may be charged for some purposes against the heir for the father's debts by the father, as indeed the case above cited from the 6th volume of the decisions of the Sudder Dewanee Adawlut, N. W. P. incidentally shows. Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it, even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindu law, the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt." That is an authority to show that ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts, because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and it being a pious duty on the part of the son to pay his father's debts, the ancestral property in which the son as the son of his father acquires an interest by birth, is liable to the father's debts. The rule is, as stated by Lord Justice Knight Bruce:—"The freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate whether ancestral or acquired by the creator of the debt."

"It is necessary therefore to see what was the nature of the debt for the payment of which it was necessary to raise money by the sale of the property in question. If the debt of the father had been contracted for immoral purposes, the son might not be under any pious obligation to pay it; and he might possibly object to those estates which had come to the father as ancestral property being made liable to the debt. That was not the case here. It

was not shown that the bond upon which the decree was obtained was given for immoral purposes; it was a bond given apparently for an advance of money, upon which an action was brought. The bond has been substantiated in a Court of Justice; there was nothing to show that it was given for an immoral purpose; and the holder recovered a decree upon it. There is no suggestion either that the bond or decree was obtained benamee for the benefit of the father, or merely for the purpose of enabling the father to sell the family property, and raise money for his own purpose. There is nothing of the sort suggested, and nothing proved. On the contrary, it was proved that the purchase money for the estate was paid into the bankers of the fathers, and credit was given to them with the bankers for the amount, and that the money was applied partly to pay off the decree, partly to pay off a balance which was due from the fathers to the bankers, and partly to pay Government revenue; and then there was some small portion of which the application was not accounted for. But it is not because there was a small portion which was not accounted for, that the son, probably at the instigation of the father, has a right to turn out the *bonâ fide* purchaser who gave value for the estate, and to recover possession of it with mesne profits. This he has been endeavouring to do after the purchaser has been in possession for a period of ten years; for the purchase was completed in 1856, and the suit was not brought until 1866, when the son says that right of action accrued to him upon his attaining his majority. Even if there was no necessity to raise the whole purchase money, the sale would not be wholly void.

"It appears, therefore, to their Lordships that the plaintiffs are not entitled to set aside the deed of sale; that the judgment of the Principal Sudder Ameen with regard to it was correct; and that the High Court were mistaken in upsetting that decision, and awarding to the plaintiff one-fourth of the estate as being one-half of the share of his father." 22 W. R. pp. 56, 58.

Conflict of rulings as to the true effect of the decision in Giridhari v. Kantoo.

6. There has been a great deal of conflict of rulings with reference to the true effect of the decision in the case of Giridhari Lal *v.* Kantoo Lal. In the case of Bhek Narain *v* Januk Sing, (2 I. L R. 438). Mr Justice White held that the judgment of the Privy Council in Giridhari

Lal's case does not lay down broadly, that the father in a Mitakshara family can sell ancestral immoveable property even where there is no legal necessity. In Bhek Narain's case, the father borrowed money by mortgaging certain ancestral property. On his failure to pay the money, the lender brought a suit to recover the amount due on the bond, by sale of the hypothecated property. The sons were made defendants in the case. The Court of first instance gave a decree against the father only. Upon appeal, the District Judge remanded the case for a finding on the issue "whether the money borrowed by the father was borrowed for an immoral purpose." Upon the evidence adduced by the parties, in the lower Court, the District Judge held "that the issue was not proved in the affirmative," and, in accordance with the ruling laid down in Giridhari Lal *v.* Kantoo Lal and in Mudun Gopal *v.* Gourbatee, (15 B L R 261) made a decree against the sons as well as the father. Upon appeal to the High Court, Mr. Justice White held, that neither of these cases when examined, with reference to the facts involved in them, can be considered as authorities for the doctrine that any charge which the father may create upon the ancestral immoveable property, during the minority of his sons, is a valid charge, and must be satisfied out of the property unless the sons can show that the charge was created to secure money borrowed by the father for immoral purposes. I. L. R 2 Cal. p. 141.

Bhek Narain v Januk Sing.

7. In Giridhari Lal *v.* Kantoo Lal the suit was instituted by the son in order to set aside the sale of ancestral property for debts due by the father. But in Bhek Narain's case, the suit was brought by the creditor against the father and the sons, for money due under a mortgage bond executed by the father alone. Under the circumstances, Mr. Justice White held that "it was incumbent on the plaintiff respondent to shew for what purpose the loan was contracted, and that the purpose was one which justified the father in charging the interests which the special appellants (the sons) have in the ancestral immoveable property" (I. L. R 2 Cal. p. 445). But the opposite view was taken of the Privy Council decision in Giridhari Lal *v.* Kantoo Lal by the Bengal High Court in Adurmony *v.* Chowdry Shibnarain (I. L. R. 3 Cal. p 1) and Lucki Dai Kuari *v.* Asman Singh (I. L. R 2 Cal. 213).

Adurmony v. Chowdry Shibnarain.

8. In a later case Mr. Justice Pontifex took the same view of the Privy Council decision in Giridhari Lal's case that was taken by Mr. Justice White in Bhek Narain *v.* Januk Singh (I. L R. 2 Cal. 241). The facts of the case decided by Mr. Justice Pontifex were as follows:—

Pursid Narain v. Hanuman.

A. the father and managing member of a Hindu family subject to Mitakshara law, executed bonds, mortgaging a portion of the ancestral estate to the father of the defendant. At the date of the mortgages A. had living a wife and two sons, one of whom was alleged to be an adult, and the other a minor. The mortgagee instituted suits on the bonds, making A. only a defendant, and in execution of decrees obtained by him in those suits, four portions of ancestral property were attached and sold by the Court, (the sale certificates being of the right, title and interest of the judgment-debtor) and were purchased by the mortgagee who got possession of the whole 16 annas of the four portions of ancestral estate sold. In a suit by the widow and the two sons of A. to recover their shares in the property from the representatives of the mortgagor, it was held that as A. alone executed the mortgages, and was alone made a defendant in the suits on the bond, the sale in execution as against the minor could pass the entire 16 annas of the estate, only in the event of the defendants proving that sufficient necessity existed for incurring the debt; if no necessity was proved, only the right, title and interest of A. passed by the sale, although the loans might not have been applied by him to immoral purposes, and the sons might, if properly proceeded against, have been bound to pay A.'s debt. As against the adult son, it was doubtful whether anything more than the right, title and interest of A. would pass, unless necessity were shewn.

9. In delivering judgment, Mr. Justice Pontifex observed—" The case of Giridhari Lal *v* Kantoo Lal decided a question of Mithila law; in that case a necessity affecting the whole family was proved to have existed, for there were execution proceedings affecting the family dwelling-house, or at least the father's rights therein, a sale of which had been advertised, and which sale, if carried into effect must have been detrimental to the family. Even if that case had not been explained in more recent decisions of the Privy Council, we think that the general language of the

judgment, applying as it did to the particular facts found in the case, cannot be taken as an authority for the proposition that a Mitakshara father may, where no necessity exists, convey or charge the rights in specific ancestral property of the other members of the family" (Pursid Narain Sing *v.* Hanooman Sahya, I. L. R 5 Cal. 850.)

10. The conflicting views with regard to the effect of the Privy Council decisions in Giridhari Lal *v.* Kantoo Lal and Mudun Thakoor *v* Kantoo Lal led to a reference to a Full Bench in the case of Lutchmun Das *v.* Giridhari Chowdry, (I. L. R. 5 Cal 855). The questions submitted and the answers given thereto are quoted below *in extenso.*

QUESTIONS.	ANSWERS.
1. In the case of a Mitakshara family, consisting of a father and one minor son, where the father (being the manager) raises money by hypothecating certain ancestral family property by bonds, and it is not proved, on the one hand, that there was any legal necessity for his raising the money, nor, on the other, that the money was raised or expended for immoral or illegal purposes, or that the lender made any enquiry as to the purpose for which it was required, can the lender (the mortgagee) enforce by suit against the father and the son the payment of his money by sale of the property during the father's lifetime?*	1. The mortgage itself upon which the money was raised could not be enforced, but the debt so contracted by the father being itself an antecedent debt within the rulings of the Privy Council, and the son being a party to the suit, the mortgagee, notwithstanding the form of the proceedings, would be entitled to a decree directing the debt to be raised out of the whole ancestral estate, inclusive of the mortgaged property.
2. Can he do so, under similar circumstances, by suit against the minor after the father's death?	2. Assuming the minor to be the only son, the mortgagee would be entitled to a similar decree against him after the father's death.

* See I. L. R. 2 Cal. p 438.

QUESTIONS.	ANSWERS.
3 If the mortgagee, under such circumstances, brings a suit against the father alone obtains a decree for payment and for sale, and buys the property himself, is he entitled, as a *boná fide* purchaser for value, to hold the property as against the infant son, either during the life or after the death of the father *	3. We think that under such circumstances, the mortgagee could not be considered as a *boná fide* purchaser for value and would not be entitled to the property, except to the extent of the father's interest, as against the infant son.*
4. Would it make any difference to the right of the mortgagee in any of the above cases, if the son, at the time of the raising of the money, and the giving of the bond, were an adult instead of a minor ?†	4. Assuming the adult son to be a party to the suit, the mortgagee would be entitled to a decree similar to that mentioned in the answer to the first question, directing the debt to be raised out of the whole ancestral estate †
5. Would it make any difference, if the money were borrowed partly to pay an antecedent debt of the father, and partly for some other unexplained purpose ?	5. In the view which we take of the case, the whole of the money borrowed would be an antecedent debt.
6. Would it make any difference, if, in the sale under the decree, the right title and interest of the father in the property were sold instead of the entire property ?	6. We consider it unnecessary to answer this question.
7. In the case of a Mitakshara joint‡ family, consisting	7. The sons not being parties to the suit, they

* See I L R 5 Cal 845.
† See I. L R 5 Cal 845
‡ See *Ib.*

* If the property be purchased by any other person then it would seem that the purchaser would acquire a complete title even against the minor I L R 6 Cal 138.

† If the adult son is not a party, his interest is not affected. 14 B. L. R. p. 187.

QUESTIONS.	ANSWERS.
of two brothers and their sons, the former being the managers, raise money by executing a zaripeshgee lease of specific family property, the lenders making no enquiry as to the necessity for the loan. Immediately after, the two brothers take a sublease. The rent not being paid, a suit is brought by the zaripeshgidar, and a decree is obtained for it against the two brothers; and in execution of the decree the same property is sold, and zaripeshgidar becomes the purchaser and obtains possession. Are the sons entitled to recover back the property; or any, and what portion of it from the purchaser?	would be entitled to recover their shares as against the purchaser If they had been made parties, they would have had apparently a good defence to the suit upon the merits.

11. In Mudun Thakoor *v.* Kantoo Lal (14 B. L. R. 187) the Privy Council held that a purchaser of joint family property, at an execution sale against the father alone, acquires a complete title against the sons. The Judicial Committee after finding in that case that the plaintiffs had failed to prove that the debt which was the basis of that decree, was contracted for immoral purposes said, "It appears that Muddun Mohun Thakoor purchased at a sale under an execution of a decree against the two fathers. He found that a suit had been brought against the two fathers; that a Court of Justice had given a decree against them in favour of the creditor; that the Court had given an order for the particular property to be put up for sale under the execution, and therefore it appears to their Lordships that he was perfectly justified, within the principles of the case of Hanuman Pershad Panday, in purchasing the property, and paying the purchase-money *bonâ fide* for the purchase of the estate."

Mudun Thakoor v K-- too Lal.

12. According to the Mitakshara the son has equal right with the father in ancestral immoveable property;

and it is not therefore easy to see how the right of the son can be affected by the decree in a suit in which he is not represented. It is true that a single person can make a sale or mortgage of the family property, for the benefit of the family. But that is because the karta or manager must have implied authority to do all that is necessary for the maintenance of the family, and for preservation of the family property. But when a suit is brought for payment of money borrowed by karta, or for foreclosure, or for sale of mortgaged property, it is difficult to see on what principle a decree can be made for sale of joint family property, unless all the joint owners are represented. Considering the wording of sections 278, 279, 280 of the Civil Procedure Code, it seems that if the sons be not parties in the decree, they may object to the sale of the whole property. In fact in the cases reported in the Indian Law Reports, Madras Series, Vol V, page 37, such claim was preferred and allowed. In those cases the judgment-debtor had transferred his interest in a dwelling-house to his sons before the same was attached by his creditors. The claim preferred on behalf of the sons being allowed the judgment-creditor brought suits to make the property in the hands of the sons liable. But the latter suits were dismissed.

13. It is true that the son is bound to pay the debts of his father, unless contracted for immoral purposes. But the creditor, ought, it seems, to sue the son, in order to make his interest in the family property liable to sale for such debts. However, as the law now is, the son's interest may be sold under a decree against the father alone provided the father is sued in a representative capacity (Umbica Pershad Tiwary *v.* Ram Sahay Lal, I. L. R. 8 Cal. 891, Shiva Pershad *v* Jung Bahadoor, I. L. R. 9 Cal 379).

[...]s the son [...]und to pay [...]e rate of [...]terest sti[...]lated by [...]e father [...]en though [...]ch rate be [...]gher than [...]t allowed [...] Hindu [...]w.

14. According to Hindu Law, interest to an amount exceeding the principal debt, cannot be claimed by the creditor; and the son of the debtor cannot, it seems, be under any obligation to pay a larger amount than the debtor himself. As the Hindu law does not apply to contracts in the Mufussil, and as the matter is now regulated by the Contract Code, the father who incurs debt is bound by law to pay interest at the stipulated rate. But the son is not under any legal obligation to pay the debts of his father, either according to the Dayabhaga or according to

the Mitakshara. According to Hindu law, the right of the father is extinguished by death; and the son becomes the absolute owner of the property which belonged to him, as if he never lived The liability of the son to pay the debts of the father is a moral obligation, the nature of which must be determined by reference to the sacred codes of Hindu law, and not by the laws imposed by a foreign Government

15. In the case of Lutchmee Dai Koeri *v.* Asman Singh, (2 I L R. p. 213) the amount of interest did not, exceed the principal sum; but the rate was clearly higher than what is allowed by Hindu law The son could not, therefore, be held bound to pay the full amount of the decree; and the sale which took place under the decree could not be binding on the son. But Mr. Justice Markby in delivering judgment, said, "Can we say here upon the face of the decree, that so far as it orders interest to be paid, it is a decree for an immoral purpose? I might almost say that such a question answers itself. It may be that under Hindu law there were some restrictions against the allowance of interest; but it is well-known that those restrictions are no longer enforced by our Courts." But it must be obvious that this remark is altogether beside the question at issue. The Hindu law as to the rate of interest was never enforced in the British Courts in the Mofussil There were certain Regulations and Acts which the English Government had passed on the subject of usury; and those Acts and Regulations were repealed by Act XXVIII of 1855. The repeal of the usury laws has extended the legal obligation of the debtor; but it cannot extend the moral or religious obligation of his son. The son is required by special texts to pay the debts of his father; but the liability being primarily a moral one, its extent ought to be determined by Hindu law.

16. The error which pervades the judgment under notice is, that the son is supposed to succeed to the rights and liabilities of the father on the same principle as in English law, whereas the fact is, that according to the principles of Hindu Jurisprudence, the right of the son to the paternal estate originates in a cause which is altogether different from the source of his liability to pay debts. According to the Mitakshara, the son by birth

acquires his right in paternal wealth. It cannot be said that by birth the son becomes also liable to pay the debts of his father. Were that the case, the texts which require that the son should pay the debts of his father would be quite superfluous. The fact is, that the liability of the son to pay the debts of the father is based upon texts. According to Hindu lawyers, the right of the son is created by the operation of the law of cause and effect; and the right of the father is also extinguished by the operation of the law of cause and effect. The result would be that, but for special texts, the son would not be bound to pay the debts of his father

17. According to the Mitakshara, the father cannot make a sale or mortgage of ancestral immoveable property, without the consent of sons, except for legal necessity. But for the special texts which require the son to pay the debts of his father, the son would not be bound to pay even a mortgage debt, according to the Mitakshara.

18. According to the Dayabhaga, the father is absolute master of all descriptions of property so long as he lives. The right of the son in the paternal wealth arises on the death of the father. The result is, that even if there had been no special text requiring the son to pay the debts of the father, still, according to the Dayabhaga, the son would be bound by any mortgage created by the father. But as to unsecured debts of the father, the liability of the son is founded solely on texts, and cannot extend further than is prescribed by texts.

19. The father's debts are a first charge upon the ancestral property, and must be paid in full before there can be any surplus for division. Narada says :—

यच्छिष्टं पितृदायेभ्यो दत्त्वर्णं पैतृकन्ततः ।
भ्रातृभि स्तद्विभक्तव्य मृणी न स्याद्यथा पिता ॥

Dayabhaga, chap. I, para 47.

As between the parceners themselves the burthen of the debts is to be shared, in the same proportion as the benefit of the inheritance. For Narada says :—

The whole property and all the heirs are liable jointly and severally to pay the debts of the father (D. K. S.

Father's debts how far a charge on the estate

Chap. VII, 26-28). It ought to be borne in mind, however, that after the death of the father, an unsecured debt contracted by him does not attain the character of one that is secured by mortgage. If the ancestral property be in the hands of the heir, then an order may be made by the Court for the sale of such property, for payment of an unsecured debt But if after the death of the father, the son sells it or conveys it away by gift, then an unsecured creditor cannot make the property liable in the hands of the purchaser or donee. (Unna Poorna *v.* Ganga Narain, 2 W. R. 296.) It has been held that a devisee is not liable for the unsecured debts of the testator, in respect of his possession of part of the estate. (Ram Ootum *v.* Omesh Chandra, 2 W. R 156.) It has been also held that a voluntary transfer of property by way of gift, if made *boná fide*, and not with the intention of defrauding creditors is valid against creditors. (4 Mad. 84) In a Mitakshara family, the right of the father in respect of ancestral property, is not greater than that of his sons, except in so far as the sons are under an obligation to pay their father's debts.

20. The power of the father in a Mitakshara family to alienate his own interest in the family property is not greater than than that of any other coparcener. The law with reference to the subject, will be discussed in the next section.

Section VIII.

THE POWER OF COPARCENERS IN A MITAKSHARA FAMILY TO ALIENATE THEIR OWN INTEREST IN THE JOINT FAMILY PROPERTY.

Vijyaneshwar's conception of joint ownership.

1. According to the Mitakshara, the right of coparceners in a joint family, is acquired by birth, and is extinguished by death. The right of every coparcener covers the whole joint family estate, according to Vijyaneshwar's conception of joint ownership. In defining what is meant by partition, Vijyaneshwar says ;—

द्रव्यसमुदायविषयाणामनेकस्वाम्यानां द्रव्यविशेषेषु व्यवस्थापनं विभागः ।

[Partition is the adjustment of several rights regarding the whole (joint family property) by distributing those rights on specific articles of property.]

2. In accordance with the conception of joint ownership, involved in the above definition, it was rightly laid down by Lord Westbury, in his judgment in the well known case of Appovier *v.* Ram Subbain, that "according to the true notion of an undivided family in Hindu law, no individual member of that family, while it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share (11 M. I. A. 89). The right of each coparcener is somewhat like a mortgagee's lien. No one undivided member can be called owner; but all have a lien on the whole property; and all the members collectively can exercise ownership. No individual member can, while the family remains joint, sell any share in any joint family property; for, so long as the property remains joint, he has no share; he has only a lien upon the whole. In the undivided state, no one can say what share will be allotted to the several members; for, by births and deaths, the extent of interest of each must be continually fluctuating. It would lead to great injustice if any individual member be allowed to sell a specific portion of the joint family property, and yet continue as a member of the corporation. It was accordingly held by the High Court of Bengal in the case of Sadabart Pershad Sahoo *v.* Fool Bash Koer, (3 B. L R. F. B. 31) that a co-owner in a family governed by the Mitakshara has no authority without the consent of the co-owners, to dispose of his individual share."

From which it follows that a co-owner cannot have power to sell any part of the family estate.

Sadabart v. Fool Bash.

3. The ruling laid down by the High Court of Bengal, in the case of Sadabart, is generally supposed to be in conflict with the decision of the Madras and Bombay High Courts on the point (*vide* the observation made by the Judicial Committee of the Privy Council in the case of Deen Dyal Lal *v.* Jagdeep Narain, I. L. R. 3 Cal. p. 205). But on careful consideration, it would appear that the decisions of the several High Courts, on the point, are unexceptionable, so far as they go, though there is an apparent conflict.

Madras and Bombay decisions supposed to be in conflict with that of the Bengal High Court.

4. Uuder the Mitakshara law a coparcener may not have power to sell any particular property, or any specific share of a particular property. But there is nothing in the Mitakshara to prevent the sale by a co-owner of the lien, which he possesses on the whole property, the essence of which lien is a right to demand partition.

But the decisions on the point are all correct so far as they go.

5. The law as to the power of a caparcener to alienate

his own share was finally settled in Madras by the case of Viraswamy Graminy *v.* Ayaswamy, (1 Mad. H. C 471).

6. In that case one of two brothers had mortgaged one of two houses, which formed part of the family property, for his own personal debt. He was then sued in an action for damages for a tort, and judgment was recovered against him. The judgment-creditor took out execution; and under a writ of *fi fa* the sheriff seized and sold the debtor's interest in the mortgaged house, and also in another. The purchaser sued both brothers to recover possession. It was decided that the mortgage and the execution were valid to the extent of the alienor's share, and that "what the purchaser or execution-creditor of the coparcener is entitled to, is the share to which, if partition took place, the coparcener himself would be individually entitled, the amount of such share, of course, depending on the state of the family." This decision has been since followed by the Madras High Court, in several other cases. The extract from the judgment quoted above, supports the inference that, in the opinion of the learned Chief Justice, a coparcener can sell his right to partition; and if that is the principle on which the decision is based, then there is no conflict between it and the ruling laid down by the High Court of Benga in Sadabart's case.

Viraswamy v. Ayaswamy

7. In the case of Venkata Chella *v* Chinnaiyan (5 Mad. H. C. 166) the Madras High Court held that "no parcener could give his alienee a title to any specific portion of the joint property, even though such portion was less than his share. In Vitla Butten *v.* Yamenama, (8 Mad. p. 6) it was held that a legatee, to whom a portion of the joint family property is bequeathed by a member of the family, takes nothing under the will. These decisions also are evidently based on the principle which I take to be the foundation of the ruling in Virasamy Graminy *v.* Ayaswamy, On that principle it follows that if a coparcener makes an alienation of his interest in his life, then the purchaser or donee acquires the alienor's right to partition. But if a bequest is made by will, the legatee can take nothing; for the alienor's right to demand partition is extinguished by his death.

Venkata Chella v Chinnayam.

8. In Vitla Butten *v.* Yamenaimma the Court observed "If by the word share is intended specific share, the argument is of course valid that a coparcener cannot before

Vitla Butten v. Yamenimma.

partition convey his share to another, for before partition it cannot be ascertained what it is. It is equally the law in Madras, that a coparcener cannot, before partition, convey away as his interest, any specific portion of the joint property. Considered in this light, the difficulties which have influenced the Calcutta High Court disappear. The person, in whose favour a conveyance is made of a coparcener's interest, takes what may on a partition be found to be the interest of the coparcener." These words clearly support what I take to be the true principle of the Madras decisions. If that is the case, then the purchaser must have the partition effected, in the lifetime of his vendor. After the vendor's death, his right to demand partition is extinguished; and a purchaser cannot claim the right.

Vasudev v. Venkatesh

9. The Bombay High Court finally decided the question in the case of Vasudev Bhat v Venkatesh, (10 Bom. 139). In delivering judgment Westropp, C. J. declared that the strict law of the Mitakshara, and the usage following it in Mithila and Benares, was in accordance with the law laid down by the Full Court of Bengal, but stated that the opposite practice had prevailed in Western India. He concluded his review of the authorities by saying "on the principle *stare decisis* which induced Sir Barnes Peacock and his colleagues strictly to adhere to the anti-alienation doctrine of the Mitakshara, in the provinces subject to their jurisdiction where the authority of that treatise prevails, we at this side of India find ourselves compelled to depart from that doctrine, so far as it denies the right of a Hindu parcener, for valuable consideration, to sell, incumber, or otherwise alien his share in undivided family property. Were we to hold otherwise, we should undermine many titles which rest upon the course of decision, that, for a long time, the Courts, at this side of India, have steadily taken. Stability of decision is, in our estimation, of far greater importance than a deviation from the special doctrine of the Mitakshara upon the right of alienation."

The principle on which the Bombay decisions are based.

10. It seems, however, that it was altogether unnecessary to have recourse to usage or to the principle *stare decisis* in order to support the actual decision in the case. According to the Mitakshara, a co-owner of joint family property cannot sell any specific property or any specific

share in any property. But there is nothing in the Mitakshara to prevent the sale or a gift of the right to demand partition which a coparcener possesses. The Madras decisions are apparently based on this principle; but the Bombay decisions are avowedly based upon a principle which is not consistent with the Mitakshara

11. The Bombay High Court, while favouring the rights of a purchaser for value, shows no indulgence to a donee to whom an undivided coparcener makes a gift of his interest in the joint family property. The reason, for the view taken by the Bombay High Court, is that in the case of a gift there is no equity upon which a decree for partition could depend But it seems that the purchaser for valuable consideration is entitled to a decree for partition, not on the ground of equity only, but because there is nothing in the Mitakshara which prohibits the sale of the right to demand partition. In this view the purchaser and donee stand on the same footing.

The confusion which arises in consequence of the wrong principle on which Bombay decisions are placed.

12. The English text writers seem to be of opinion that it is on equitables principle only that the rights of a purchaser from a coparcener are worked out by means of partition. But the application of principles of English law in expounding the Mitakshara or the Dayabhaga leads to endless confusion. "A further question arises" says Mr Mayne "as to what date must be taken as fixing the amount of interest he (the mortgagee from a coparcener) possesses in the joint family property For instance, suppose one of two brothers grants a mortgage upon the family property for his own benefit, and the transaction runs on until after three more brothers are born, and the father is dead, and then the creditor sues to enforce his claim—has he a lien upon one-third of the property which was the interest of his debtor at the time of the mortgage or only upon one-fifth which is his interest at the time of suit?" Mr. Mayne is evidently of opinion that these questions are unanswerable. But if the view of law referred to above be accepted, then such difficulties cannot arise.

Equitable relief given to purchaser by the Bengal High Court.

13. In the Full Bench case of Sadabart Pershad, the Bengal High Court held that a coparcener in a joint family, governed by the Mitakshara law, cannot alienate his interest without the consent of his co-owners. But in the subsequent case of Mahabeer Pershad *v.* Ramayad Singh, (12 B. L. R.) the Court decreed partition and order-

Mahabeer v. Ramayad.

ed that the share of the alienor should be charged with the amount received by him as purchase money or as loan. In the latter case the father mortgaged the family property without legal necessity. The property being sold in execution of the decree obtained by the mortgagee, the eldest son sued on his own behalf and on behalf of a minor brother to set aside the sale. The Court found that the plaintiff had assented to the transaction, consequently only the interest of the minor was concerned. The Court after observing that the result of setting aside the sale unconditionally would be "that the property on going back will come to be enjoyed by the joint family as it was before the mortgage and sale; and of necessity, by virtue of the Mitakshara law, will return to the management of the very man who obtained Rs. 3000 from the first defendant, on the pretended security afforded by the mortgage, which did not seem to accord very well with equity and good conscience." As the father might at any moment claim partition, the Court proceeded to point out that "plainly the first defendant is in equity entitled as against the father to insist upon his calling his share into being and realizing it for their benefit. Substantially the same reasoning applies to the eldest son who aided his father in effecting the mortgage." On these considerations, the Court decreed that the property be recovered by the plaintiffs for the joint family. But the decree was accompanied by the declaration that on recovery, the property be held and enjoyed by the family in defined shares. And it was also declared that the share of the father and of the eldest son be jointly and severally subject to the lien thereon of the first defendant for the repayment of the sum Rs. 3000 advanced by the first defendant to the second defendant (the father) and interest thereon.

14. The above decision was passed before that of Mudun Thakoor *v.* Kantoo Lal. Otherwise a sale in execution of a decree against the father could not be set aside at the instance of the sons when the debt was not for immoral purposes.

15. According to the decision in Mahabeer *v.* Ramayad a donee would get nothing for there are no such equities in his favour as there are in favour of a purchaser.

16. In the case of Deen Dyal Lal *v.* Jugdipnarain, (I. L. R. 3 Cal. p. 198) it has been ruled by the Privy

The views of the Lords of the Privy Council on the point.

Council that the right, title and interest of a co-owner in a joint ancestral estate may be attached and sold in execution to satisfy a decree obtained against him personally under the law of the Mitakshara, as well in Bengal as in Bombay and Madras. The ruling of the Bengal High Court in the cases of Sadabart and Mahabeer Pershad therefore now applies only when the sale is a private one and not in execution of a decree. The distinction is not warranted by any principle of Hindu law. The Privy Council was evidently in favour of setting aside the Bengal decisions; and the above ruling was laid down as the first step towards doing so. To a certain extent the Lords of the Judicial Committee were influenced by the English law of partnership. (I. L. R. 3 Cal. p. 209)

Section IX.

THE FATHER'S POWERS IN RESPECT OF ANCESTRAL PROPERTY ACCORDING TO THE DAYABHAGA.

Father can deal with every description of property in any manner he likes.

According to Jimutavahana, the leading authority of the Bengal school, the right of a son to his father's wealth, does not originate from the date of his birth; but from the date of the father's death. So long as the father lives, he is absolute owner not only of his self-acquired property, but also of all ancestral wealth. It, therefore, follows that the father can deal with the same in any manner he likes, irrespective of the consent of his sons

2. There are some texts which apparently declare that the son has equal right with the father in ancestral property; and that the father cannot make a sale or gift of ancestral property without the consent of sons. But Jimutavahana has explained away all these texts in some manner or other (Dayabhaga, chap. II, paras. 9-30).

Texts which are against that view are explained away.

3. With regard to the text of Jajnyavalkya* quoted in para. 9, chap. II of the Dayabhaga, Jimuta proposes three different interpretations to avoid its plain meaning. The last interpretation which must be taken as the correct

---

* भूर्या पितामहोपात्ता निबन्धो द्रव्यमेव वा तत्र स्यात् सदृशं स्वाम्यं पितुः पुत्रस्य चोभयो।

Dayabhaga, chap II, para. 9.

one, in the opinion of the author, is apparently unexceptionable. But when considered in connection with th context in the original Sanhita, the text would appear to b meant to bear a different meaning altogether. The tex says that "in ancestral property the rights of the fathe and son are equal." Jimuta says that this does not mea that by birth the son becomes a co-owner with the fathe in ancestral property. According to the interpretation finally adopted by Jimuta, the text means that where th father is a Kshetraja son, he cannot take a double share in the event of a partition with the sons. (Dayabhaga chap. II, para. 59.)

4 With regard to the text of Vyasa which declares tha the father cannot make a sale or gift of immoveable pro perty without the consent of sons, Jimuta says that it is moral precept, but not a binding rule of law. The text i as follows:—

स्थावरं द्विपदञ्चैव यद्यपि स्वयमर्ज्जितं ।
असम्भूय सुतान् सर्व्वान न दानं न च विक्रयः ॥

The finite verb in the text is understood; and Jimut says that the ellipsis is to be supplied by the interpolatio of the word कर्त्तव्य and not by the word सिद्ध्यति If the wor कर्त्तव्य be interpolated, then the text would mean, "Thoug immoveables and bipeds have been acquired by a ma himself, yet without convening all his sons no sale or gif should be made." Jimuta does [not] give any reason why th word सिद्ध्यति may not be interpolated. But the reason i given by the commentator Sreekishen. The commentato says, that the finite verb which is interpolated ought t have the same nominative as the participle 'convening The word सिद्ध्यति would have a different nominative; an it cannot be taken as the word in the mind of the hol legislator.

It is generally supposed that Jimutavahana justifies the sale of immoveable property by father.

5. Thus it is shown that the text is a mere moral pr cept and is not legally binding. Having done this, Jimut says that if the father sells ancestral immoveable propert without the consent of sons, he incurs sin; but the sa itself cannot be held invalid in consequence of such wa of consent, for as he says वचनशतेनापि वस्तुनोऽन्यथाकरणासम्भवात् This passage being erroneously translated in Colebrook

it is supposed that Jimuta justifies the sale of ancestral property, on the principle *factum valet*; and this notion has been the fruitful source of a great many erroneous decisions on some of the most important points of Hindu law.

without the consent of sons, on the principle factum valet.

6. Jimutavahana could not be so illogical as to say that a sale by a person, who has not the necessary power to effect, it, would yet be valid when actually effected It would have been rank heresy on his part to make such an assertion, in the face of the maxim "nothing is too heavy for a text."

This is erroneous.

7. What Jimuta says in the passage quoted above, is nothing more than a truism, and is in no way equivalent to the doctrine *factum valet*. According to Jimuta the father is absolute owner of all ancestral property so long as he lives. That being the case, he must have power to sell or dispose of ancestral property, in any manner, without the consent of sons. Ownership, according to Hindu Jurists, is a thing, the essential characteristic of which is the power of absolute disposition; and the nature of that thing cannot be altered or affected by a hundred texts. A text can produce an invisible result. But it cannot alter the nature of a thing. It cannot make a thing lose its essential characteristic. This is nothing but a truism.

8. It would not be of much use to enquire how the error originated. But it is a matter of surprise that it should not have been as yet detected by any one, in all those hotly contested cases in which the doctrine has been erroneously applied. The fact is, that when the mind is accustomed to an erroneous notion, it is exceedingly difficult to shake it off. English Judges and lawyers may well be excused, when it is taken into consideration that the error escaped detection even by a scholar and jurist like Pandit Shama Charan Sirkar. The learned pandit vehemently deplores the mischievous results of the doctrine. But notwithstanding his evident solicitude to get rid of it, he saw no way out of the difficulty.

9. In Mr. Colebrooke's translation of the Dayabhaga, the passage is rendered in English by the words "a fact cannot be altered by a hundred texts." But this translation is misleading, if not inaccurate. The word fact may mean an "event" or an "act;" or it may mean "a thing." But the word वस्तु in the original can never mean an event.

It is equivalent to the English word substance. The passage ought to have been translated thus :—" a thing cannot be altered by a hundred texts."

Raghu Nandan's commentary on the dictum laid down by Jimuta.

10. In a note to para. 30, chapter II, of Mr. Colebrooke's translation of the Dayabhaga, there is a translation of a portion of Raghu Nandan's commentary on the passage which apparently supports the doctrine of *factum valet*. But on careful consideration it would appear that the illustration in the commentary is meant for a different purpose altogether. The commentator says, " If a Brahmin be slain, the precept ' slay not a Brahmin' does not annul the murder; nor does it render the killing of Brahmin impossible." What then ? " It declares a sin." Raghu Nandana does not say that the murder can be committed without sufficient bodily power. If the murder is committed, then it is proved by the act that the author had power; and the illustration further shews that that power is capable of being exercised notwithstanding texts prohibiting its exercise. Similarly, if a man has legal ownership in a thing, and is therefore entitled to sell it, he may exercise his right, notwithstanding any prohibition in any text.

11. There is nothing in the Dayabhaga or in the commentaries which can be interpreted as equivalent to the doctrine of *factum valet*. Jimutavahana maintains the validity of a sale or gift of ancestral property by the father, not on the principle *factum valet* but on the ground that an absolute owner must have the right to sell.

CHAPTER VI.

Section I.

ORIGIN OF THE PRACTICE OF MAKING WILLS.

1. In the last chapter, the extent of a Hindu's power of alienation *inter vivos* in respect of joint family property has been dealt with. In this Chapter, I propose to deal with the powers of testation now possessed by Hindus.

Wills inconsistent with our Shasters.

2. I may observe here that testamentary disposition, which is intended to take effect after the proprietor's death, is not only unknown in Hindu Law, but is inconsistent with its fundamental principles The practice of testation first came into existence, at the time of the commencement of British rule, in the Presidency towns. It seems likely therefore that the example of Englishmen making wills led the natives who came into contact with them, to adopt the practice, the natural inclination of the father being not to recognize that the son has any right to control his acts and the making of wills being well calculated to check the spirit of insubordination among sons. It is well-known that serious misunderstandings sometimes arise between fathers and sons, especially where the father takes a second wife in old age. Out of natural love and affection, the father cannot take any irrevocable step against the sons. But as a will is revocable, it is just the weapon which a Hindu father would resort to in order to keep his sons in terror. The Shasters restrain the exercise of arbitrary power by the father The Dayabhaga of Jimuta first withdrew that restraint; but the principle on which Jimuta withdrew the restraint being misunderstood, the Courts of law have given their sanction to even testamentary disposition by Hindus, thus extending their powers to deal with their property to an extent not contemplated by Jimutavahana or any other authority.

The practice originated in the Presidency Towns about the time of the commencement of British rule

Mr Mayne on the origin of wills among Hindus

3. Mr. Mayne says that "the true origin of testamentary power is to be sought for in Brahminic influence." But the doctrines which are maintained in the Brahminical treatises on law, are altogether inconsistent with the

principle of testamentary disposition; and there is no reason whatever to suppose that the practice of testation among the Hindus had its origin in Brahminical influence. On the contrary, it would seem that wills would have remained unknown among the Hindus even to this day, if the Courts established by the foreign conquerors of the country, had not deprived the Brahmins of all the power which they exercised in the country from time immemorial. The Brahminical idea is, that the family property is a fund for the maintenance of the members. They would never give such arbitrary power to any individual member as is implied in a will. Gifts for religious and charitable purposes were no doubt favoured by the Brahmins, as they are everywhere by the priestly class. There are numerous devices for encouraging gifts to Brahmins. But it is difficult to see what special advantage they could gain by encouraging the practice of testation. Gifts to idols very seldom bring any advantage to the higher classes of Brahmins.

4. The Mitakshara and the Dayabhaga agree in holding that ownership is extinguished by death. If the deceased person was a member of a joint family governed by the Mitakshara, then on his death the surviving members become the sole owners of the family property, as if the deceased never existed. If the deceased was not a member of a joint family, then on his death his heir succeeds to the estate by virtue of special texts of law. But for the texts of law which create the right in favour of the son or other heir, the property of the deceased would remain without an owner, according to the principles universally accepted by Hindu Jurists. Wills are therefore not only unknown in Hindu law, but are inconsistent with its spirit.

The text of Harita and Katyana not the foundation of Hindu wills.

5. It is supposed by some that the texts of Harita and Katyana* contain the germs of Hindu Wills. But on

---

* सुस्थेनार्त्तेन वा देयं श्रावितं धर्मकारणात्।
अदत्त्वा तु मृते दाप्यस्तत्सुतो नात्र संशयः॥

Katyana.

वाचा यच्च प्रतिज्ञातं कर्मणा नोपपादितं।
तदृणं धर्मसंयुक्तं इहलोके परत्र च॥

Harita.

going through these texts, it would appear that the promise of a deceased person does not directly create any real right in favour of the promisee. The son or other heir must fulfil the promise of the late proprietor, as if it were a debt due by him. The texts of Harita and Katyana cannot therefore be taken as an authority for the making of wills by Hindus.

Usage alone can justify a will by a Hindu.

6. Ownership being extinguished by death, any disposition made by a person to take effect after his death must necessarily be void in Hindu law. By usage the practice may be justified. But if the desposition is a sinful one, as where a virtuous son is disinherited, there even usage will not justify the disposition.

Section II.

HISTORICAL ACCOUNT OF WILLS CASES AMONG HINDUS.

1. It has been already stated that the practice of testation first came into existence in the Presidency towns. The earliest known will is that of Omichand, whose name, in connection with that of Clive, is well-known to readers of Indian history. Omichand's will was dated the year 1758 It, therefore, seems likely that the practice of making wills had come into existence before the commencement of British rule in India In Bengal the testamentary power of Hindus was recognized by the English Courts of Law at a very early date. The first case is that of Rasik Lal Datta *v.* Chaitanya Charan Datta. The testator who was the father of four sons, and had property of both descriptions, ancestral and self-acquired, thought proper to leave the whole property to his younger sons to the disinherision of the two elder of whom the second disputed the will But the will was held valid.

Rasik Lal Chaitanya Charan.

The Nad Rajah's c

2. Then came the Nadiya Rajah's case. The document sought to be set aside in the case is sometimes spoken of as a will; sometimes as a deed of gift. But on referring to the original as printed in the history of the family by Babu Kartic Chandra Roy, it appears that it was a deed of gift, and not a will The language of the deed is clear. But if there was any doubt that would be re-

moved on reference to the history of the circumstances which led to it, and on reference to the subsequent steps which the Rajah took in order to give validity to his act.

3 The following is a literal translation of the deed.

ranslation he deed.

"To my beloved son Shib Chandra Roy Bajpai.

"I am too old now; and at this time of my life it is not for me to manage the business of my principality. It is now proper that I should devote myself to such acts as contribute to the spiritual happiness of the soul in the next world. This principality has never been divided; so I convey away to you, by this deed, all my zemindarees and all the firmans, old and new, and all the paraphernalia of state conferred by the Huzoor (the emperor of Delhi). The right of performing the worship of idols, and all the zemindaree papers, profits and loss, will be yours Your brothers and your brothers' sons will have no right to the same. Sambhu Chandra has a large family, and he will, therefore, get Rs. 15000, out of the Mashohara assigned to me by Sarkar. [Then the amounts payable to the other members of the family are mentioned] The deed then goes on to recite:—neither you nor they shall ever do anything in contravention of the terms of this deed. If you do anything at variance with this deed, that will not be valid in law and will not be sanctioned by the authorities. 9th Jait, 1187."

4. After executing this deed of gift, as it is rightly called in the family history, the old Rajah took the necessary steps to have the zemindaree sunnud from Government in Shib Chundra's favour. There were great difficulties at first, owing to the opposition of the Rajah's youngest son Sambhu Chandra. The sunnud was after all obtained A great durbar was then held by the Raja in his own house, in which he formally installed Shib Chandra as Rajah, and himself rendered to him all royal honours. After this, the old Maharaja retired from the world, and passed the rest of his life on the banks of the river Bhagiratha, at a place near Nadiya.

5. All these circumstances clearly show that it was a case of gift *inter vivos* and not that of a will. The summary of the plaint and written statement in the Kshitis Bangsabali also shows that the parties regarded it as a case of gift and not as a testamentary devise. The Pandits, in accordance with whose opinion the case was decid-

ed, also viewed it in the light of a gift *inter vivos*. Had it been a case of testamentary devise, the Pandits would probably have said that such a thing is unknown in Hindu Law.

6. As it was, the Vyavastha of the Pandits and the actual decision in the case must be regarded as in entire accordance with the principles of the Dayabhaga. There can be no doubt whatever that according to Jimutavahana, the father is absolute master of all descriptions of ancestral property, and that though a gift or sale of ancestral immoveable property without the consent of sons, is sinful, yet such gift is not invalid, being made by one who is the absolute owner for the time being.

The Nadiy Raja's case i no authorit for holding that a fathe in Bengal ca disinherit h virtuous so by will.

7. It would thus appear that the Nadiya Raja's case is no authority for holding that a father can disinherit a son by a testamentary bequest. Mr. Colebrooke appends a note to the case in which he agrees with the pandit's opinion as being in accordance with the doctrines of Jimutavahana. He ends by saying "No opinion was taken from the law officers of the Sudder Court in this case. But it has been received as a precedent which settles the question of a father's powers to make an *actual* disposition of his property, even contrary to the injunction of the law whether by gift or by will or by distribution of shares."

8. The word italicised, in the above, shows that Mr. Colebrooke also took the words वचनशतेनापि, &c., in chap. II, para. 30 of the Dayabhaga, as equivalent to the doctrine of *factum valet*. It is therefore no wonder that he should accept the case as a precedent which settles the testamentary power of a Hindu father in Bengal. But it will be shown that, according to the principles of Hindu Jurispundence, a testamentary devise cannot take any effect whatever, except as an approved usage.

9. The Nadiya Raja's case was decided in the year 1792; and it was followed next year by the case of Dial Chand *v.* Kissore Dasee, (Montr. 371) where the property appears to have been self-acquired.

10. In the year 1800 a most important case arising out of the Raja Naba Kishen's Will, was litigated in the Supreme Court. The testator who had a natural born son and an adopted son, bequeathed an ancestral taluk to his adopted son, and the four brothers of such son,

thereby depriving his natural son of all interest in the taluk, and his adopted son of four-fifths of the interest. The validity of the Will was admitted without dispute in the case, through the advice of the English lawyers who conducted it.

11. In 1808 the will of Nemy Charan Mullik was contested in the Supreme Court. But the decree declared "that by Hindu Law, Nemy Charan Mullik might and could dispose by will of all his property as well moveable as immoveable, and as well ancestorial as otherwise."

The current decisions versed for time.

Bhawany v. amkant.

12. In 1816 the current of decision was disturbed by the case of Bhowany Charan v. Ramkanta, (2 S. D 202). It was a case in which the father had made a gift of all his property to his younger son, thereby disinheriting the elder son. The pundits looked upon the case as one of illegal partition; and declared that the disposition was invalid The result was, that the gift was set aside. According to the true principle of the Dayabhaga, the gift was legally valid though morally wrong, as in the Nadiya case Even if looked upon in the light of a partition prohibited by the Shastras, still the act was legally valid. The texts and rules relating to partition contained in the Dayabhaga must be considered in the light of moral precepts, and not in the light of legal injunctions. If the father makes an actual gift in favour of one son to the exclusion of the others then the gift is valid, whether it is looked upon in the light of a gift or an unequal partition, though the father incurs sin by infringing the moral rules relating to partition. (See the comment of Sreekishen on para. 21 of chap. II and on para. 4, chap. VII of the Dayabhaga).

The rules ating to rtition in Dayabha are mere ral injunc as though so declar express-

owers of nation distribu- stand on same ing.

13. Except in the Bengal school, the power of the father is as limited in respect of unequal distribution as it is in respect of making alienations. There is no conflict between the texts. Mr. Mayne is evidently wrong when he says that the two sets of texts are quite irreconcileable. The difficulty arises not on account of conflicting texts, but on account of the fact that Jimuta has explained away one set of texts by shewing that they contain only moral precepts whereas, he has discussed the other set of texts, as if they were positive rules of law. The apparent conflict between one portion of the Dayabhaga and another can be easily reconciled, as I have shown

above. There is however a great deal of discussion, on the subject, in Mr. Mayne's Treatise on Hindu Law, (Art. 415) and in the judgment of the Supreme Court in the case of Cosy Nath *v.* Hara Sunderi. The fact is that Hindu lawyers deal with rules of law and morality, in the same work; and it is almost impossible for an English lawyer, however learned, to discover what rules are legally binding, and what rules are not so, by referring only to the English translations of Colebrooke or Sutherland. Without carefully studying the original, under competent teachers, even native lawyers are apt to fall into error in such matters.

14. When the cases under notice were decided, the usual practice was to refer to pandits for opinion. The opinions given by the pandits were generally correct. But the English Judges and lawyers generally misconceived the grounds of their opinion; and they very often laid down rulings and deduced conclusions which became fruitful sources of error and confusion. For example, the opinion given by the pandits in the Nadiya Raja's case is unexceptionable. The actual decision in the case is also unexceptionable. But English lawyers came to the conclusion that the pandits justified the gift of the whole property to the eldest son on the ground of *factum valet*; and they therefore saw no difference whatever between a gift *inter vivos* and a testamentary bequest.

15. At the present time, the Judges decide Hindu law questions on the authority of case law and on the authority of English text-books and translations. Within the last twenty years many important rulings have been set aside. But with due deference, it is to be observed that the new rulings are in a great many cases quite as erroneous as the old ones, if not more so. This state of things is far from being satisfactory. But it is not likely to be improved until arrangements are made for giving a better training in Hindu law to those who are admitted as members of the profession.

16. But to return. Mr. Macnaghten was not in favour of recognizing unlimited power in the father to deal with ancestral immoveable property. But the reasons which he gave for his opinion are altogether erroneous. However, his opinion led the Supreme Court of Bengal to refer to the Judges of the Sudder Court in a case, in the year 1831. With reference to the questions asked, the Judges of the

Sudder Court gave the following reply which has since been accepted as settling the law on the point.

"On mature consideration" said the Sudder Judges "of the point referred to us, we are unanimously of opinion that the only doctrine that can be held by the Sudder Dewany Adawlut consistently with the decisions of the Court, and the customs and usages of the people, is, that a Hindu, who has sons, can sell, give, or pledge without their consent, immoveable ancestral property, situated in the province of Bengal; and that, without the consent of sons, he can by will prevent, alter or affect their succession to such property."

In a note, it was stated that this certificate overruled the case of Bhowany Charan. As to gifts *inter vivos* the law, as laid down in this certificate, is in accordance with the Dayabhaga. But as to wills, it is founded entirely on a misconception. In the Tagore will case, the question was raised in the plaint; but at the time of hearing, the Counsel for plaintiff declined to argue the point.

The history of Wills in Southern India.

18. In Southern India the validity of Hindu wills was open to question for a longer time. Between the years 1817 and 1829 the question arose, in several cases, before the Madras Sudder Court But in none of these cases was it finally decided. In the latter year, Madras Reg. V was passed. It recited that wills were instruments unknown in Hindu Law, and that in some cases, wills had been made containing provisions altogether repugnant to its principles; and by this Regulation it was enacted that for the future Hindu wills should have no legal force whatever, except so far as they were in conformity with Hindu Law according to authorities prevalent in the Presidency. Wills were accordingly not only set aside, where they prejudiced the issue as by an unequal distribution of ancestral property (Moottoovengada *v.* Toonbayaswamy Mad. Dec. of 1849, p. 27); but the Courts also laid down that where a man, without issue, bequeathed his property away from his widow and daughters, such a will would be absolutely invalid and illegal, unless they had assented to it (Tullapragadha *v.* Corovedy; Sevacany *v.* Veneyanmal, Mad. Dec. of 1850, p. 50).

19. These decisions made wills of Hindus wholly inoperative. But in the very next year a case was decided which ultimately led to a complete revolution. The

following account of that case is quoted from Mr. Mayne's Treatise on Hindu Law.

"The suit was by a widow to recover her husband's estate, which consisted in part of ancestral immoveable property. The defendants set up a will executed by the deceased, by which he constituted them executors and managers of his estate, and after providing for his wife and daughters, left the rest of his property to religious and charitable uses, with a promise that if his wife, then pregnant, bore a son, the estate should revert to him on his coming of age. The will was found to be genuine, but the widow set up an authority to adopt a son in the event of a daughter being born. The Civil Judge consulted the Sudder Pandits, and asked whether the will was valid, and if so, whether it would be invalidated by the authority to adopt, if actually given The Pandits answered, "The will referred to in the question is valid under the Hindu law, the testator having thereby bequeathed a portion of his estate for the maintenance of his wife, and other members of his family whom he was bound to protect, and directed the remainder to be appropriated to charitable purposes in the event of his wife who was then pregnant, not being delivered of a son. If the testator had really given his wife verbal instruction to adopt a son in the event of her not bearing such issue, her compliance with those instructions would of course invalidate the will according to the Hindu law, it being incompetent for the testator, who authorised the adoption of a son, to alienate the whole of the estate, and thereby injure the means of the maintenance of his would be heir." The Civil Judge found against the alleged authority to adopt, and decided in favour of the will. His decision was given in 1849. In appeal to the Sudder Adalut, the widow urged that under Reg. V of 1829 the will was void. The case was heard by a single Judge, who affirmed the decree of the Lower Court. In regard to the validity of the will, he said, "The third objection taken by the appellant is, that the will is illegal, because the widow is the party to whom the law gives the estate. The Court have referred to all the authorities quoted by the appellant in support of his position, and find that although the opinions regarding wills of Hindus generally are conflicting, yet that the majority of them are against

the argument of the appellant. It is unnecessary to cite all the opinions given on the subject, and the Court will content itself with referring to the case of Ram Tanu Mullick *v.* Ram Gopal Mullick, Mor. Dig. p. 3; in which it was held that a Hindu might, and would dispose by will of all his property, moveable and immoveable, and as well ancestral as otherwise, and this decision was affirmed on appeal by the Judicial Committee of the Privy Council. Questions, however, regarding the legality of the will now under consideration were referred to the law officers of the Court, to whom the legislature have assigned the duty of declaring the law on such matters, and they distinctly stated their opinion, that it is a valid and good instrument. The arguments therefore, of the appellant that it is not recognizable under the provisions of Reg. V of 1829 cannot be sustained.

"Upon this decision Mr. Strange lately a Judge of the Madras Sudder and High Courts, remarks, "This decision was passed by a single Judge, confessedly ignorant of the law. He sought to guide himself by authorities, but found them conflicting Supporting himself by the opinion of the Pandits, and by a judgment of the Calcutta Supreme Court, affirmed by the Privy Council, he upheld the will then in issue which appointed trustees to the testator's property, to the prejudice of his widow. The Pandits then applied to are the same who have since declared that no Hindu can make a will, and they explain that they gave the opinion rested on in the above case under the idea that they were called upon to test the will by the power the testator had to deal with the property during his lifetime in the manner he had done by the will."

However, the case went on appeal, to the Privy Council, and was there affirmed. Their Lordships said, "It may be allowed that in ancient Hindu Law, as it was understood through the whole of Hindustan, testamentary instruments, in the sense affixed by English lawyers to that expression, were unknown; and it is stated by a writer of authority, (Sir Thomas Strange) that the Hindu language has no term to express what we mean by will. But it does not necessarily follow that what in effect, though not in form, are testamentary instruments, which are only to come into operation, and affect property, after

the death of the maker of the instrument, were equally unknown. However this may be, the strictness of the ancient law has long since been relaxed, and throughout Bengal a man, who is the absolute owner of property, may now dispose of it by will as he pleases, whether it be ancestral or not. No doubt the law of Madras differs in some respects, and amongst others with respect to wills, from that of Bengal. But even in Madras it is settled that a will of property, not ancestral, may be good A decision to this effect has been recognized and acted upon by the Judicial Committee, and indeed the rule of law to that extent is not disputed in this case If then the will does not affect ancestral property, it must be, not because an owner of property by the Madras law cannot make a will, but because, by some peculiarity of ancestral property, it is withdrawn from the testamentary power It was argued by the respondent's Counsel, that in all cases where a man is able to dispose of his property by act *inter vivos*, he may do so by will; that he cannot do so when he has a son, because the son, immediately on his birth, becomes coparcener with his father; that the objection to bequeathing ancestral property is founded on the nature of an Hindu undivided family; but where there are no males in the family, the liberty of bequeathing is unlimited. It is not necessary for their Lordships to lay down so broad a proposition, as they think it safer to conform themselves to the particular case before them. Under the circumstances of testator's family when he made his will and codicil, and having regard to the instruments themselves, the Pundits to whom this question was referred by the Court, the Pundits of the Sudder Dewanny Adalut have declared their opinion that these instruments are sufficient to dispose of ancestral estate. That opinion has been affirmed by two Judges successively, of whom it is but justice to say that they appear to have examined the subject very carefully, and after much consideration to have pronounced very satisfactory judgments, though in one or two incidental observations which have fallen from them, their Lordships may not entirely concur" (6 M. I. A. 344).

With reference to the above decision, Mr. Mayne says that it "was in unconscious conformity to the popular feeling, a feeling which aimed at increased liberty in

regard to property, and which showed itself by attempts to alienate it in ways unknown to the law of the Mitakshara." Mr. Mayne is evidently of opinion that the desire for increased liberty was something quite new in the country at the time; and that although wills are unknown in Hindu law, yet the Courts were perfectly justified in giving effect to testamentary disposition by Hindus The fact is, that the desire for unlimited power to deal with property existed from the beginning of time. The law of the shastars kept that desire within reasonable bounds. In Bengal Jimutavahana first relaxed the stringencies of the old law. But the founder of the Bengal admits that right to property is extinguished by death of the owner. The heirs to the deceased become owners of the property at the moment of his death. A testamentary disposition must therefore be necessarily inoperative even according to the Dayabhaga.

Sami Josin v. Ramien

20. In Naga Lutchmy *v.* Nada Raja the judgment of the Sudder Court was pronounced in the year 1851; and that of the Privy Council in 1856. In the intermediate period, the Sudder Court held in another case that a Hindu cannot make a will in favour of a foster son, on the ground that the Hindu Law does not recognize a foster son (Sami Josin *v.* Ramien, Mad Dec. of 1852, p. 60).

21. In 1855 and 1859 the Madras Sudder Court again broadly laid down the rule that a Hindu's will was inoperative unless it took effect by delivery of possession. In 1861 there were three cases, in all of which the wills were set aside as being opposed to Hindu Law. In those cases the Sudder Court refused to be bound by the decision of the Privy Council in Naga Lutchmy *v.* Nada Raja, holding that it had been based upon an opinion of the Pandits, which was given under a misapprehension.

Valinayagen Pachicha.

22. In 1862 the question came before the High Court of Madras in a case where the testator who had no male issue, had bequeathed the bulk of his property, moveable and immoveable, to a distant relation, allotting what was admitted to be a sufficient maintenance to his widow. No possession had been given; and confessedly the disposition could only operate as a will. The High Court affirmed the will on the authority of Naga Lutchmy *v.* Nada Raja; and the question has not been re-opened since. (Valinayagam *v.* Pachechi, 1 Mad. H. C. p. 326.)

The history of will cases in the Bombay Presidency.

23. In the Bombay Presidency the course of decisions relating to wills took a similar turn. In a very early case in which the Pandits were consulted, they said, "There is no mention of wills in our Shasters, and therefore they ought not to be made." Accordingly wills were held invalid even where a gift would have been perfectly valid, (1 Bor.). The current of opinion, however, changed, and the power of a Hindu in Western India to make a testamentary disposition of whatever is his absolute property is now clearly established (Bhagvan Dulabh *v.* Kala Sanker, I. L. R., 1 Bomb. 641. Lukshun Bai *v.* Ganpat Moroba, 5 Bomb. H. C.; Beer Pertab Sahee *v.* Maharaja Rajendra Partab Sahu, 12 M. I. A. 37).

Beer Pertab v Rajendra Pertab.

24. The last of the three cases quoted above arose in that part of Bengal where the law of the Mitakshara prevails. In that case the Privy Council observed: "It is too late to contend that because the ancient Hindu Treatises make no mention of wills, a Hindu cannot make a testamentary disposition of his property. Decided cases, too numerous to be now questioned, have determined that testamentary power exists, and may be exercised at least within the limits which the law prescribes to alienation by gift *inter vivos*." The decision of the Privy Council in Beer Pertab *v.* Rajendra Pertab must therefore be accepted as an authority as to the testamentary power of Hindus throughout India.

25. Though, as already shown, wills are altogether inconsistent with the fundamental principles of Hindu Law, they must now be accepted as valid on the ground of usage unless the disposition is sinful.

SECTION III.

EXTENT OF TESTAMENTARY POWER POSSESSED BY HINDUS.

1. It has been already stated that the validity of a Hindu's will can be maintained only on the ground of usage. It therefore follows that if the disposition is against written precepts of law, then it cannot have any legal effect. A custom or usage can never sanction that which is declared as positively sinful in the Shastars.

The legality of Wills considered with reference to the Dayabhaga.

2. According to the Dayabhaga the father is absolute owner of all descriptions of property, so long as he lives. A sale or gift of ancestral property by the father must therefore be held valid, if made in his lifetime. The father incurs sin, according to Jimuta, by alienating ancestral property, without the consent of sons, though the alienation itself is declared valid, being made by one possessing absolute ownership. But as soon as a man dies his right to the property, which he possessed in his lifetime, is extinguished; and the son or other legal heir becomes the owner of that property by the operation of the law of cause and effect. Testamentary dispositions must therefore be wholly invalid, according to those very principles on which Jimuta upholds the validity of sale and gift *inter vivos* by the father. On the ground of usage, however, testamentary dispositions must be now held valid, so far as they are not in violation of written precepts of law. But the disinheriting of a virtuous son is sinful according to Jimuta's interpretation of the texts; and any disposition by which such a son is disinherited must necessarily be void.

3. Upon carefully considering all that Jimuta says, with reference to the alienation of ancestral property by the father, there can be no doubt that a Hindu father in Bengal cannot, by testamentary disposition of ancestral property, disinherit a virtuous son. But it is generally supposed that Jimuta maintains the validity of a sale or gift of ancestral property on the principle *factum valet ;* and as that principle is applicable equally to wills, so it is now accepted as beyond question that a father in Bengal can by will disinherit his sons in respect of ancestral property. Among English text writers and translators there was considerable difference of opinion on the point. But as they failed to comprehend the drift of the reasoning by which Jimuta justifies the sale or gift *inter vivos* of ancestral property by the father, the grounds on which their opinions are based are altogether erroneous Pandit Shama Charan Sircar protested against the doctrine on the ground of its being opposed to express texts. But he failed to perceive where the error lay ; and he reluctantly gave way to the principle *factum valet.*

4. The Nadiya Raja's case is apparently the first case in which the question arose. But I have already shown

that that was a case of gift *inter vivos* and not of will. Cases in which a father disinherits his sons, are very rare. The Nadiya case is apparently the only one on the authority of which Mr. Colebrooke modified his opinion as to the right of a father to deal with ancestral property. (See Strange's Hindu Law, Vol. II, pp. 425, 426.) The question was raised, for the last time, in the Tagore will case; but at the hearing of that case, the Counsel for plaintiff declined to argue the point. Since then it is held to be finally settled. But the ruling, on the point is so palpably erroneous that, notwithstanding the weight of authority, it cannot be accepted as a binding precedent consistently with the principles of Hindu Law which the Courts are bound to administer

5 As regards self-acquired property, Jimuta says that a father may make an unequal partition of it from such motives as are referred to in para 74, chap. II of the Dayabhaga. It follows, therefore, that from the same motives a father may make an unequal distribution of his self-acquired property by testamentary disposition, if such disposition be allowed as lawful at all.

6. According to Jimutavahana, the father is absolute owner of all descriptions of property, ancestral or self-acquired, moveable or immoveable Yet Jimuta lays down rules for partition, as if the father's power is restricted. This at first sight seems anomalous. In fact, Mr. Mayne says that "as regards the right of a father in Bengal to make an unequal partition, it can hardly be said that the law is satisfactorily settled even now." (Mayne's Hindu Law, §. 325.) But the fact is that, according to Jimuta, the father incurs sin by making an unequal partition, in a manner not allowed by law. Jimuta nowhere says that an unequal partition of ancestral or self-acquired property by the father is altogether invalid. In para. 83, chap. II, he quotes the following text of Naradra :—

व्याधितः कुपितश्चैव विषयासक्तचेतनः ।
अयथा शास्त्रकारी च न विभागे पिता प्रभुः ॥

[A father who is afflicted with disease or influenced by wrath, or whose mind is engrossed by a beloved object, or who acts otherwise than the law permits, has no power in the distribution of the estate.]

From this text it may seem, at first sight, that the

partition made by a father under the circumstances is void. But, according to Jimuta, the father is absolute owner so long as he lives; and being absolute owner, he must have power to make any disposition. There can be no doubt that, according to the Dayabhaga, the father has legal power to make an unequal partition, just as he has legal power to make a gift or sale of ancestral property, without the consent of sons. Jimuta's idea is, that a father has not moral power to make an unequal partition; and the text of Narada must be interpreted in that sense.

7. The text of Narada in para. 83, chap. II of the Dayabhaga, and the text of Katyana in para. 84 evidently apply to ancestral as well as self-acquired property. Such being the case, it must be admitted that, according to the Bengal school of law, a father cannot, by testamentary disposition of his self-acquired property, wholly disinherit a virtuous son. Allowing that, on the ground of usage, a testamentary disposition must prevail over the operation of the law of cause and effect by which the sons become the owner of all paternal wealth immediately on the death of the father, still it does not follow that a will can have any such effect where the disposition is positively sinful.

8. Considering the principles on which the law of the Dayabhaga is based, there can be no doubt about the view of the law taken above. But, in consequence of the erroneous interpretation of an important passage of the Dayabhaga, the contrary has been held, so long, as beyond question, that the view of law as set forth above, must take the profession by surprise; and it is hardly to be expected that they would accept it at once.

9. If there is no son, grandson or great-grandson, and if there is no prospect of having a son, still a person cannot dispose of his ancestral or self-acquired property by will in any manner he likes. When such a person makes testamentary disposition of his property in a manner which interferes with the right of his collateral heirs, the disposition may be held valid only on the ground of usage, though, according to the general principles of Hindu Law, the heir would become the owner of the property, on the death of the last owner; and the testamentary disposition made by the last owner can have no effect, being made by a person without ownership.

10. When a member of a Mitakshara joint family dies

without leaving male issue, then his interest being extinguished, the surviving members become the owners of the whole property, as if the deceased never had any interest in the same. Under the circumstances, it has been held by the Madras High Court, that the deceased co-owner cannot interfere with the law of survivorship, by making any testamentary disposition of his interet. The right of the survivors must prevail over that of the legatee. The decision of the Madras Court in Vitla Buten *v.* Yamenamma, (8 Mad. H. C) is in accordance with the principles of Hindu Law. But if it be accepted, then a Hindu cannot make a will at all. Even if a Hindu can make a will at all, on the ground of usage, then that power can be conceded only so far as is sanctioned by valid usage. If the disposition is a sinful one, then usage cannot sanction it. But if the disposition is not a sinful one, then on the ground of usage it may be held valid, though at variance with the fundamental principles of Hindu Law.

The validity of Wills under the Mitakshara Law.

11 According to the decision of the Bengal High Court in Sadabart Persad Sahu *v.* Foolbash Koer, (3 B L. R 31) a member of a joint family governed by the Mitakshara cannot make a sale or gift of his interest, even in his lifetime, without the consent of the other co-owners; and the testamentary power of such a co-owner is out of question.

The decision of the Bengal High Court.

12. In Madras a coparcener in a joint family can make a sale or gift of his share in his lifetime. In Bombay a coparcener can make a sale but cannot make a gift of his share. (Vasudev *v.* Venkatesh, 10 Bom. 139) and, therefore, the question arose whether a co-owner without male issue can make a testamentary disposition of his share. According to the view taken in this treatise, the conflicting decisions of the several High Courts on the point, are unexceptionable, so far as they go. A coparcener in a Mitakshara family cannot sell or convey away by gift any specific property or any specific share in any property. Looking at this point of view, the decision of the Bengal High Court in Sadabart Pershad *v.* Foolbash Koer cannot be taken exception to. But it ought to be considered that there is nothing in the Mitakshara to prevent the sale or gift of the right to demand partition which a coparcener in a Mitakshara family may exercise at any time. In this view, the Madras decisions in the case of Virasamy

Madras High Court.

Bombay High Court though apparently conflicting, may yet be reconciled.

v. Ayasamy, (1 Mad. H. C. 471) and in other cases must be held to be unexceptionable. In any case a coparcener cannot make a testamentary disposition of his right to demand partition. The right being personal, it can be exercised only during the lifetime of the coparcener.

13. It is hardly necessary to add that a father in a Mitakshara family cannot make a testamentary disposition of the family property, if he has male issue. A will can never be valid where a sale or gift would be invalid, though, from what is set forth above, it will appear that a will is not necessarily valid where a sale or gift *inter vivos* is so.

14. Every person of sound mind and not a minor may now dispose of his property by will within such limitations and restrictions, as are set forth above.

15. A Hindu woman may dispose of her Stridhan by gift, will or sale unless it is immoveable property given by her husband, (Teencowrie Chatterjea *v.* Dinanath Banerjea, 3 W. R. 49).

SECTION IV.

NATURE OF THE ESTATE THAT CAN BE CREATED BY A HINDU'S WILL.

1. That a Hindu cannot tie up his property in perpetuity follows evidently from the principle that ownership is extinguished by death; and the heir or legatee takes the estate not as representative of the deceased; but by virtue of the right which is created in his favour by law or usage. On this principle a Hindu by will cannot make a bequest of anything at all; far less can a will be made by him of anything less than the whole estate. But in Soorjee Monee Dassee *v.* Dina Bandhu Mullick (6 M. I. A.) the Privy Council held that a Hindu can by will bequeath property by way of remainder or by way of executory bequest, upon an event which is to happen at the close of a life in being. In that case, the testator, a Hindu resident in Calcutta, by his will left all his property to his five sons. But there was a clause in the will which declared that if any of the five sons should die without leaving male issue, his share would pass over to the other

[Margin note, partly cut off:] ...oorjee ...nee v. ...a Bandhu ...llick.

ons then living or their sons, and that neither his widow or his daughter nor his daughter's son should get any share out of his share. The event which was contemplated took place. One of the sons died, leaving no male issue. Under the law of Bengal, the widow claimed her husband's share, on the ground that the gift over was invalid. The claim of the widow, however, was rejected both in the Supreme Court and the Privy Council.

4. The Privy Council evidently viewed the disposition, made by the will, in the above case, as a gift made with a condition annexed, fixing its duration. Even in this view, it seems doubtful whether a conditional gift made in favour of the legal heirs would retain its original character, after the death of the donor. For after the death of the donor, the donee, who is also heir, would be in possession of the reversionary right also. On the distinct co-ownership theory of the Dayabhaga, the donees, on becoming heirs, would take distinct shares in the reversionary right. The reversion in respect of each gift would belong to the donee himself. The result would be, that the donees would be the full owners after the donor's death

3. The most important case with reference to the right of a Hindu testator to create perpetuity is that of Jotindro Mohun Tagore *v.* Ganendra Mohan Tagore. There the testator who had property, ancestral and self-acquired, real and personal, producing an income of 2½ lacs had only one son named Ganendra Mohun who became a convert to Christianity, during the lifetime of his father. According to Hindu law, Ganendra had, by his conversion, forfeited his title to the paternal inheritance. But Act XXI of 1850 enabled him to claim those rights which he lost according to Hindu law. If the testator had simply disinherited Ganendra by his will, he might perhaps have done so, notwithstanding Act XXI of 1850. For by that Act, a Hindu father is not deprived of the right which he has to refuse to give a share of his wealth to a son who is degraded, (see Dayabhaga, chap. II, paras. 84, 85; and Sreekishen's comment on the same). But the will recited that sufficient provision had been made for Ganendra's maintenance, and that he was to take nothing under the will. It then vested the whole estate in trustees with provisions for their number being constantly maintained.

The Tagore will case.

After providing for numerous legacies, the testator proceeded to direct the course in which the corpus of the property should devolve. As soon as all the charges were paid off, the trustees were to convey the real estate to the use of the persons who should under the limitations of the will be entitled to it, subject to the limitations therein expressed. The person beneficially interested in the real estate was to be ascertained by reference to the following limitations:—

1. To the defendant Jotindra for life.
2. To his eldest son, born during the testator's lifetime for life.
3. In strict settlement upon the first and other sons of such eldest son in tail male.
4. Similar limitations for life and in tail male upon the other sons of Jotindra, born in the testator's lifetime, and their sons successively.
5. Limitations in tail male upon the sons of Jotindra born after the testator's death.
6. After the failure or determination of the uses and estates hereinbefore limited to the defendant Surendra for life.
7. Like limitations for his sons and their sons.
8. Upon failure or determination of that estate, like limitations in favour of the sons of Lalit Mohun, who was dead at the time of making of the will and their sons.

The will expressly adopted primogeniture in the male line through males, and excluded women and their descendants. Alienation was prohibited.

At the time of the testator's death, Jotindra, the head of the first series of estates had no son, nor had he any during the suit.

Surendra, the head of the second series of estates, had a son, Promoth Kumar, who was born in the lifetime of the testator.

Lalit Mohun the head of the third series was dead at the time of the making of the will, but left a son Suttendra born, during the lifetime of the testator, and capable of taking under the will.

The son Ganendra, sued to set aside the will except as to legacies, contending—

1. That it was wholly void as to the ancestral estate.
2. That in any case the father was bound to provide him with adequate maintenance.
3. That the whole framework of the will, resting as it did on a devise to trustees, was void, since the Hindu law recognized no distinction between legal and equitable estates.
4. That the life estate to Jotindra was void, since a Hindu testator could bequeath nothing less than what was termed the whole bundle of rights.
5. That at all events, the estates following upon this life estate were void, as infringing the law against perpetuities.
6. That as to everything after the life estate, there was an intestacy, and the plaintiff was entitled as heir at law.

At the time of the hearing, the Counsel for the plaintiff abandoned the first point. The Counsel being a foreigner, it was not possible for him to refer to the original Dayabhaga, and the translation of Mr. Colebrooke being misleading, if not inaccurate, it was not possible for him to perceive the drift of Jimutavahana's reasoning on the point. In all probability the native pandits of the country were not even referred to, and the result was that, notwithstanding the interest at stake, the most important objection to the validity of the will was withdrawn.

Of the several issues raised in the case, the last only was decided in favour of the plaintiff, upon the principle that the kind of estate tail which the testator wished to create was one wholly unknown and repugnant to Hindu Law. Their Lordships of the Privy Council observed, "The power of parting with property once acquired must take place either by inheritance or by transfer each according to law. Inheritance does not depend on the will of the individual owner; transfer does. Inheritance is a rule laid down (or in the case of custom recognized) by the State not merely for the benefit of individuals, but for reasons of public policy. Domat 2413. It follows directly from this, that a private individual who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and that the gift must fail, and the inheritance take place as the law directs."

It was contended that the successive persons might be regarded as donees for life, having the power and subject to the restrictions imposed by the will. If so, they would defeat the rights of the plaintiff as heir at law.

Jotindra had no sons alive at the death of the testator. But of course he might have sons, and in default of natural born sons, might adopt It was held, however, that none of these could take. Not the possible issue of Jotindra; because the donee must be a person capable of taking at the time when the gift takes effect, and must be in existence at the death of the testator. Nor were Surendra or his sons entitled to take as donees, under the will; because they were only, to take "after the failure or determination, of the previous series, and these words were held to mean the actual exhaustion of the line of Jotindra in conformity with the will, and not its incapacity to succeed by reason of the illegality of the will. Consequently the event on which they were to take had never arisen and never could arise. The result was, that the plaintiff was held entitled to the whole estate after the life of Jotindra.

4. The Tagore will case lays down, that a bequest made in favour of a person, not born at the time of the testator's death, is void. This rule of Hindu law is not affected by the Hindu Wills Act, though there are certain sections of the Succession Act embodied in it which at first sight, indicates a contrary intention on the part of the Legislature. The exception to Sec. 99 distinctly provides that, "If property is bequeathed to a person described as standing in a particular degree of relation to a specified individual, but his possession of it is deferred until a later time than the death of the testator, by reason of a prior bequest or otherwise; and if a person answering the description is alive at the death of the testator, or comes into existence between that event and such later time, the property shall at such later time go to that person, or if he be dead to his representative" From this and the following sections, it seems, at first sight, that under the Wills Act, a Hindu can now make a will in favour of unborn persons to a certain extent. But the fifth proviso in sec. 3 of the Act provides that "nothing in the Act contained shall authorise any Hindu to create in property an interest which he could not have created before the

1st September 1870. It has been accordingly held that the prohibition extends to the person who is to take the interest as well as to the interest itself. The result is that a bequest in favour of persons unborn at the time of the testator's death, is void whether the Wills Act applies to the case or not (Ananga *v.* Sona Moni, 8 I. L. R. p. 637).

Ananga Manjari v. Sona Moni.

5. Wills containing trusts to accumulate the proceeds of the property have been held invalid In the case of Kumara Asima *v.* Kumara Krishna Dev, (2 B. L. R. O. C. 274) the trust was to accumulate for 99 years, and no direction was given as to the appropriation of the fund at the end of the time.

Direction to accumulate void

Asima Krishna v. Kumar Krishna.

6. In the case of Krishna Ramani Dasi *v.* Ananda Krishna Bose, (4 B. L. R. O. C. 231) the fund was to accumulate till it reached 3 lacs, and was then to be divided, and the process of accumulation to recommence. Such provisions are altogether repugnant to the fundamental principles of Hindu Law according to which, property can never remain without an owner. According to the principles of Hindu jurisprudence, property is for enjoyment, gift or sacrifice, (Dayabhaga, chap. II, sec. 6, para. 13; Mit. chap. II, sec. 1, para. 14). Such being the law, any direction contained in a will which would make it impossible for the owner to enjoy it or to make a gift of it, must be void. Directions which forbid alienation within the limits incidental to the estate created, or which prohibit partition, or attempts to free property from any of the legal burthens, such as liability to debts or maintenance, are void in law, (Nity Charan Pyne *v.* Gunga Dasee, 4 B. L. R. O. C. 265; Pramotha Dassee *v* Radhika Pershad, 14 B. L. R. 175; Makunda Lal *v.* Ganesh Chandra, 1 Cal 104; Sonatan Bysak *v.* Jagat Soonderee Dassee, 8 M. I. A. 66). As to directions against maintenance, see Act XXI of 1870, sec. III.

Krishna Ramani v. Ananda Krishna.

Direction in restraint of partition void.

7. It has been held by the Madras High Court that a clause in a will whereby the enjoyment of property by the son is postponed beyond the period of his minority is invalid on the ground that it takes away *pro tanto* the right which the Mitakshara vests in the son, (Devaraja *v.* Venayaga; Cunniah Chetty *v.* Lutchman Orassoo). A similar decision was given upon a Bengal will, where the testator had attempted to postpone the enjoyment of the shares of his grandchildren until they had attained the age

of 21 years, on the ground that an estate cannot remain in suspense or without an owner. (Srimati Brama Mayi *v.* Jogesh Chandra, 14 B. L. R. 400).

Sonaton Bysak v Jagut Soondaree.

8. A Hindu who had four sons gave by his will his entire property, moveable and immoveable, to the family idol with the further direction that the property should never be divided, but that his sons and grandsons in succession, in the male line, should only use and enjoy the surplus proceeds, one of the sons acting as manager. In case of disagreement, the surplus was to be divided in certain proportions. It was held in the case:

1. That the extent of the testamentary power of disposition by Hindus must be regulated by the Hindu law.
2. That the grant to the idol was not absolute; but that, upon the true construction of the will, the whole of the testator's property was given for the benefit of the testator's four sons and their offspring in the male line, subject, however, to the performance of the acts, business and ceremonies and festival, and to the provisions for maintenance contained in the will
3. The division of surplus proceeds did not constitute a division of the family.
4. The direction in the will as to succession in the male line did not exclude the widow of the grandson of the testator.

Shosi Shikhar v. Tarakeshwar.

9. A gift by will upon condition that the subject matter should descend on heirs male only, is void by Hindu law. (Shoshi Shikareshwar Ray *v.* Tarakeshwar Ray, I. L R. 6 Cal. p. 421.) In the case cited above, the testator made a bequest of certain immoveable property to his three nephews and their descendants in the male line, with a condition that "if any of them die childless, then his share shall devolve on the survivors." As to devolution by survivorship the will was held valid. But the clause restricting the succession to heirs male was held void. The result was, that the surviving nephew took the entire estate, but only as a tenant for life, the will being inoperative so far as it directed succession in the male line.

Caly Nath Nag v. Chundra Nag.

10. In the case of Caly Nath Nag *v.* Chundra Nath Nag, (I. L. R. 8 Cal. p. 378) the testator gave the whole

of his property, subject to certain charges, to his grandsons in these words :—I give the whole of my property to my grandsons, but until those portions of the said property and the monthly stipends which I have given to some to enjoy for the natural term of their lives shall revert to the estate after their deaths, my estate shall not be divided amongst any of my grandsons or great-grandsons. After all the pensioners have died, and after the enjoyment of the said pensions and property shall have ceased, the executor's powers shall be annulled—and then my grandsons and my grandsons' heirs, that is to say, my great-grandsons shall be able to divide the whole of the property and take their father's shares.

He further directed that for five years after his death, his family should remain joint and allowed to his executors, Rs 400 for family expenses.

11. It was held in the case that the will contained sufficient direct words of present gift to the grandsons, and that the clause in which it was attempted to postpone their enjoyment, and the clauses which directed accumulation must be rejected as repugnant to and inconsistent with Hindu Law. (8 I. L. R. p. 378)

12. A devise which cannot take effect at all is, as if it had never been made Consequently the property devised passes to the heir The rule of English Common Law that the undisposed residue of personal estate vests in the executor beneficially, does not apply in the case of a Hindu's will. (Tagore *v.* Tagore; Lala Bhai *v.* Mankuverbai, 2 Bom. L. R. p. 388.)

SECTION V.

FORM OF A HINDU'S WILL; PROCEDURE FOR OBTAINING PROBATE.

The Wi Act.

1. A Hindu's will need not be in writing except in cases to which the Hindu Wills Act applies (Bhagvan Dullabh *v.* Kalu Shankar, I. L. R, 1 Bom. 641). But wills and codicils to which the Hindu Wills Act applies, must be written and attested in the manner provided by that Act, unless the executant is a soldier enjoyed in actual warfare, or is a mariner at sea. Even where writing is necessary, it may

be on plain paper, and need not be registered. Under the Wills Act, a will cannot be revoked except by another will or codicil, or by some writing declaring an intention to revoke, or by the burning, tearing or otherwise destroying the same. (Section 57.)

2. The Hindu Wills Act applies to all wills and codicils made by any Hindu, Jaina, Sikh or Buddhist, on or after the first day of September 1870 within the territories subject to the Lieutenant-Governor of Bengal, and within the local limits of the ordinary original jurisdiction of the High Courts of Judicature at Madras and Bombay. It applies also to all such wills and codicils made outside those limits as relate to immoveable property situate within those territories or limits.

3. Wills and codicils to which the Hindu Wills Act applies, must be proved in the Court of the District Judge within whose jurisdiction the testator had, at the time of his decease, a fixed place of abode, or had any property, moveable or immoveable. (Section 240)

4. No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction within the Province shall have granted probate of the will under which the right is claimed, or shall have granted letter of administration (Section 187.)

5. After any grant of probate or letters of administration, no other than the person to whom the same shall have been granted, shall have power to sue or prosecute any suit or otherwise act as representative of the deceased throughout the province in which the same may have been granted, until such probate or letters of administration shall have been recalled or revoked. (Section 260.)

6. The grant of probate or letters of administration may be revoked or annulled by the District Judge for just cause. (Section 234.)

Act V of 1881.

7. The procedure for obtaining probate and letters of administration is now regulated by Act V of 1881.

8. The High Court has concurrent jurisdiction with District Judges in the exercise of all the powers under the Wills Act. (Section 264.)

CHAPTER VII.

PARTITION.

Section I.

THE NECESSITY OF RULES FOR PARTITION.

Nature of the right possessed by the members of a joint family in their undivided property.

1. I have already referred to the circumstances which favoured joint living in ancient times. When the descendants of a common ancestor lived together for generations, the impression naturally gained ground that right to ancestral property is acquired by birth, and is extinguished by death. The family corporation remains the same, notwithstanding the changes effected in its personnel by births and deaths. Under the circumstances, the idea naturally gains ground that right to ancestral property is created by birth, and is extinguished by death. So long as the family remains undivided, the members are maintained out of the income of the family property. But no one can say what is the extent of interest possessed by any one in the property. If one member has a larger family than another, then he may enjoy a larger share of the income than the others But if his family is diminished by death or by the marriage and transfer of his daughters to another family, he still gets nothing more or less than what is necessary for his maintenance. If the family remained joint for ever, then it would not be necessary to know at all what the extent of the interest of each individual member is.

Necessity of rules for partition.

2. But the family corporation cannot, from its very nature, remain undivided for ever. The number of members sometimes becomes so large that joint living becomes impossible. Even if the number be not excessive, still there must be misunderstandings and quarrels which cannot end except by separation. With the progress of civilization there arise powerful causes which tend in the

same direction. Thus the early legislators found it absolutely necessary to enact laws for determining—

Questions which must be determined in making a partition under the Mitakshara.

(1) Who are entitled to demand partition and separate allotment.
(2) What things are liable to partition.
(3) At what time partition may be made.
(4) What are the shares allotable to the several members.

Partition does not produce any important result according to the Dayabhaga.

3. In the Bengal school, the law relating to partition has practically become obsolete. Jimutavahana maintains that sons, grandsons or great-grandsons do not acquire any interest, by birth, in the family property; and that they, like other heirs, become entitled to the paternal heritage at the time of the owner's decease. The right to the heritage is vested in distinct shares in the legal heirs. The quantity of the shares of the several members is, therefore, determinable not by the law relating to partition, but by the law of Inheritance. Jimuta has incorporated the rules as to partition in his work; and calls it Dayabhaga or Partition of Heritage. But practically he has repealed the law relating to partition. Considering the nature of his doctrines and views, it seems that the title of his work is a misnomer. It should have been called Dayadhikar instead of being called Dayabhaga.

The importance of partition under the Mitakshara Law.

4. The law relating to partition is properly applicable to joint families under the Mitakshara Until partition, the extent of interest of the several members in a Mitakshara family, must be continually fluctuating, in consequence of births and deaths in the family. When partition takes place, then the shares of the co-owners are ascertained and fixed for the first time. According to Jimutavahana and his followers, the shares to which individual members are entitled, are known before partition. The share which an individual takes by inheritance cannot decrease by the birth of sons; because sons do not acquire any interest by birth. If an individual dies before partition still his share is taken by his heirs, and not by his surviving coparceners. Thus it happens that in a family governed by the Dayabhaga, the shares are known before partition. And partition effects very little change beyond dissolving the family union. But in a Mitakshara family the shares of the several members are determined by partition.

5. Partition, according to the Vijnaneshwar, is the adjustment of many rights over the whole property by distributing those rights on particular portions of it. Before partition, the right of each co-sharer extends over the whole property The effect of partition is to create, in favour of each co-owner, an exclusive right to a part in lieu of the joint right which he previously possessed over the whole (Mit. chap. I, sec. I, para 4.)

Definition of partition according the Mitakshara.

6. Jimutavahana defines partition, in one place, as the allotment of separate portions of the family property to the co-sharers corresponding to the shares already owned by each Even before partition, the share of a coparcener according to Jimuta is known. By a partition an allotment is made in respect of that share Allotment of shares to the sons by the father is called partition. But the sons acquire the right to the shares allotted to them through implied gift by the father The above definition is therefore abandoned, and partition is ultimately defined as complete separation, or declaration of right to separate portions. The first part of the definition applies to partition by co-sharers, the latter part applies to partition by the father.

Jimuta's definition.

SECTION II.

WHO ARE ENTITLED TO PARTITION.

1. According to the Dayabhaga theory all those who are owners of the joint family property, are entitled to demand partition. When partition actually takes place, the mother and certain other females sometimes take a share. But these latter cannot demand partition; and the share which is allotted to them is by way of maintenance. As a general rule, the question who are entitled to demand partition in a Dayabhaga family, is more a question of the law of inheritance than of partition. The question can be answered only by ascertaining—

Who are entitled to partition.

(1) Who was the last owner of the property?
(2) When he died?
(3) Who were his nearest heirs at the time?

According to the Mitakshara all the male descendants of the common ancestor have an interest in the property

Mitaksha

which originally belonged to that ancestor; and any such coparcener may demand partition.

Rules for determining the shares of those who are entitled to demand partition.

2. The next question that arises: What shares do they take? Suppose there are sons, grandsons and great-grandsons of the ancestor living jointly. Are they all entitled to equal shares? If there had been no special rules then their shares would be equal But Jajnyavalkya says—

अनेक पितृकानान्तु पितृतो भागकल्पना ।

(Mit. Chap. I, Sec V, para. 1)

In commenting on the above text, Vijnaneshwar says that "although grandsons have by birth a right in the grandfather's estate, equally with sons; still the distribution of the grandfather's property must be adjusted through their fathers, and not with reference to themselves. The meaning here expressed is this: if unseparated brothers die leaving male issue; and the number of sons be unequal one having two sons, another three, and a third four; the two receive a single share in right of their father, the three then take one share appertaining to their father, and the remaining four similarly take one share due to their father. So, if some of the sons be living, and some have died leaving male issue, the same method should be observed; the surviving sons take their own allotment, and the sons of their deceased brothers receive the shares of their own fathers respectively." (Mit. Chap. I, Sec. V, para 2)

To ascertain the shares of the members in a Dayabhaga family it is necessary to know the dates of birth … of … ancestor living or dead. Not so under the Mitakshara.

3. If the descendants of the common ancestor live together for generations, they are still reckoned as joint owners of the family property; and when partition is to take place, all that is necessary to ascertain is their mutual relationship. When their mutual kinship is ascertained, then partition is effected, and their shares are determined on the principles laid down by Jajnyavalkya and his commentator. To effect a partition in a case governed by the Dayabhaga, it is necessary to know the dates of birth and death of predeceased members. But in a Mitakshara family, the surviving members remain in possession of the whole property as if the predeceased members never existed. It is not by the law of partition that their shares are ascertained. The dates of birth or death of predeceased members may be unknown, yet a partition may be effected in a Mitakshara family.

4. There is only one case in which a surviving male member in a Mitakshara family may not be entitled to partition notwithstanding his being free from defects which operate as grounds for exclusion from inheritance. But that is a case which can hardly ever arise. If the son, grandson, and great-grandson, of a man die in his lifetime, and he have only a great-great-grandson, then the latter cannot claim partition from him; and on his death, the property goes to the surviving coparceners. If the deceased was a member of a joint family, then the property would vest in the surviving coparceners as sole owners; and the position of the great-great-grandson cannot be better even then. In fact he would be excluded from partition though otherwise entitled. Katyana says—

The cas which a scendant the comi ancestor not be e tled to pa tion.

अविभक्ते मृते पुत्रे तत्सुतं रिक्थभागिनं ।
कुर्व्वीत, जीवनं येन लब्धं नैव पितामहात् ॥
लभेतांशं सपित्र्यन्तु पितृव्यात्तस्य वा सुतात् ।
स एवांशस्तु सर्व्वेषां भ्रातॄणां न्यायतो भवेत् ॥
लभेत तत्सुतो वापि निवृत्तिः परतो भवेत् ।

Katyana cited in Ratnakara.

From this it appears that the son of the great-grandson cannot claim partition from the great-great-grandfather It, therefore, necessarily follows that if a man's son, grandson, and great-grandson die in his lifetime, his great-great-grandson cannot claim to succeed him by survivorship. He could not claim partition; he was not a joint owner; and on the death of the ancestor, it cannot be said that the property remains in his possession. The property goes by succession to such other male descendants of the common ancestor who acquired it, as were joint owners with the deceased, at the time of his death. If the deceased had a brother or nephew, living jointly with him, then the property would go to such brother or nephew; and the great-great-grandson of the deceased will not have any right to demand partition from the brother or nephew of the great-great-grandfather. The text of Katyana is apparently the basis of the judgment delivered by Mr. Justice Nana Bhai Hary Das in the case of Moro Vishwanath *v.* Ganesh Vithal (10 Bom. H. C., 463).

5. A purchaser of the rights of a single member in a joint family governed by the Mitakshara may compel his

Right purchas

the interest of a co-owner to demand partition.

vendor to exercise his right of demanding partition. But if the partition is not already effected in the lifetime of the vendor, then after his death the right of the purchaser would, it seems be of no avail. (Ramayad *v* Mahabeer, 12 B. L. R.; Deen Dyal *v*. Jugdip, 3 I. L R. 298.)

Son born after partition by father but before his death can claim only father's share.

6 According to the Bengal school of law, sons begotten after a legal partition made by the father of his self-acquired property, are the sole heirs to the share taken by the father; and such after-born son can have no claim, legal or moral, to demand a revision of the original partition; nor can the separated sons claim to share with the after-born son.

Son begotten before but born after partition can claim to have the partition revised.

Posthumous son.

7. A son begotten before partition, but born afterwards may claim to have the partition revised. (Dayabhaga, chap. VII, para. 4) If a posthumous son can inherit at all, according to the Dayabhaga, the right is evidently legally enforceable, when the partition is made by the brothers after the father's death. (See the comment of Sree Kishen on Dayabhaga, chap I, para. 20; Raghu Nandun's Sudhitatwa, p 474, Battola Edition.)

8. If partition is effected by the father, still after the father's death, the after-born son may, it seems, legally claim to have such partition revised in respect of the part which is ancestral.

9. The act being done under a mistake, so far as ancestral property is concerned, it cannot be held as legally valid especially when the father does not reserve to himself his legal share. When the father reserves to himself his legal share, it is the interest of the divided sons to re-open the partition. If the father upholds an illegal partition by contesting any suit brought to set it aside, in his lifetime, then it cannot be re-opened But after the father's death, the after-born son may, it seems, legally claim to have such partition revised, because the presumption would be, that if the father lived, he would have got it set aside, though the point is not free from doubt and is fortunately not of much practical importance.

10. According to the Dayabhaga, the father cannot make a partition of ancestral property, until his wives are past child-bearing. If a son be born after such partition, then that very fact proves that the partition was effected illegally Such being the doctrine of Jimuta, he maintains also, that the after-born sons can claim to have the partition re-opened. Whether the right is a legal or

moral one is not stated in the Dayabhaga. As the father has absolute power over ancestral property, he can, it seems, uphold the partition if he chooses to do so. But the father may, it seems, have it set aside on the ground of mistake; and after his death, the after-born son may also make a like demand; though in the absence of authority, it is difficult to say what the law is.

The lav the Mitak shara as to the pos thumous

11. According to the Mitakshara, the after-born son is entitled to the father's share; and also to all that which the father acquires after partition No distinction is made as to the property being ancestral or self-acquired. (Mit. chap. I, sec. VI, para. 2)

12. A son born after the father's death and after partition by the brothers, takes his proper share from the brothers. (Mit. chap. I, sec. VI, para. 2.)

13. The above rule is applicable to the posthumous son of a brother or other coparcener born after partition by the survivors. (Mit. chap. I, sec. VI, para. 11.)

14. If the widow of a deceased coparcener be known to be with child, then no partition can be made until the result of the conception is known. (Mitakshara, chap. I, sec. VI, para. 12.)

Success of collate heirs bor after the death of t owner

15. According to the Bengal school of law, the existence of the legal heir, at the time of the decease of the owner, is the cause of the heir's legal right. The question, therefore, arises, whether existence in the mother's womb is sufficient to create such right. So far as lineal succession is concerned, the authorities are agreed that the posthumous son born alive inherits. (See the comment of Sree Kishen on Dayabhaga, chap. I, para. 20; Raghu Nandan's Sudhi Tatwa. Battola edition, p 474.) It is, however, not equally clear whether collateral relations conceived in the womb at the time of the death of the *propositus*, but born afterwards, take a vested interest. The case of Viraja Mayu *v.* Nava Krishna Roy. (Sev. 238) seems to be in favour of such collateral heir.

The st born chi

16. If the child dies in the womb, then his existence is not taken into account in practice.

Right o mother t share

17. When the father makes a partition among his sons, then, according to the Mitakshara, he is bound to allot a share to each of his wives. (Mit chap. I, sec. II, para. 8.) Sumrun Thakoor *v.* Chandra Man Misser, I. L. R. 8 Cal. 17.

18 When the partition is made by brothers after the father's death, then all the widows of the father are entitled to a share equal to that of the sons. (Mit. chap. I, sec. VII, para 2. Damooder Misser *v.* Senabaty Missran, I. L R. 8 Cal. p. 537.)

It has been held that the grandmother is also entitled to a share in the joint family property, under the Mitakshara Law, (Badri Roy *v* Bhagwat Narain Doobey, I. L. R. 8 Cal. 649.)

Rights of sisters.

19. According to the Mitakshara, sisters also are entitled to a fourth share out of the shares of their brothers. (Mit. chap. I, sec. VII, para 6) But the right of the sisters is not recognized in practice Unmarried sisters are entitled to have property sufficient for their marriage expense, Damoodor Misser *v.* Sevabaty Missran, I. L. R. 8 Cal. 537.

The Shmriti Chandrika does not admit that the mother is entitled to a share.

20 The Shmriti Chandrika, which is considered as of very high authority in Southern India, does not allow any share to the wives or widows of the father. With reference to the texts which prescribe that shares should be given to them, Bhatta Devananda says, that the wives and widows of the father are entitled to maintenance only. The amount of the maintenance is not to exceed the share of a son; but it may fall short of that. The doctrine of the Shmriti Chandrika prevails in Southern India.

The law on the subject in Bombay.

21. In Bombay the same doctrine apparently prevails as that in Southern India, though in the case of Laksman Ram Chandra *v.* Satyabhama, (2 I. L. R. Bom. p. 494,) Mr. Justice West states that the mother is entitled to a share on partition.

In the North-West.

22. The High Court of Allahabad has laid down that a widowed mother is not only entitled to a share on partition by the sons, but that when the share of one of the sons is sold in execution, she can bring a suit for separate allotment. (Bilaso *v.* Dina Nath, I. L. R. 3 All p. 88.)

In Bengal.

23. The High Court of Bengal has laid down that even when a partition takes place in the lifetime of the father, the mother is entitled to have a share set apart for her. (Pursid Narain *v.* Hanooman Sahoy, I. L. R., 5 Cal. p. 845.)

Dayabhaga law on the subject. Widow succeeds to the

24. According to the Dayabhaga, if a man dies childless, leaving a widow, then the widow succeeds to his share in joint family property, and can demand partition.

(Dayabhaga, chap. XI, sec. I; chap. III, sec. I, cl. 16. Saudaminee *v.* Jogesh Chandra Day, I. L. R. 2 Cal. p. 262.)

share of h[illegible] childless husband a[illegible] can deman[illegible] partition.

25. If the owner dies, leaving male issue, then his childless widows get only maintenance. The widows, who are mothers of male issue, are entitled to shares on partition by their sons; but they cannot demand partition (Dayabhaga, chap. III, sec. 2 paras. 29 and 30; Jadu Nath *v.* Bishwa Nath, 9 W. R 61.)

Childless widows of the father entitled to maintenan[illegible]

26. Partition, very seldom takes place in the lifetime of the father. But if it takes place, then according to the Bengal authorities, the childless wives of the father are entitled to equal shares with the sons. (D. K S., chap. VI, paras. 22—26.)

Childle[illegible] wives of t[illegible] father enti[illegible] tled to sha[illegible] when parti[illegible] tion is ma[illegible] by father.

27. The grandmother also is entitled to a share when partition takes place among grandsons (D. K. S sec VII, para. 2. Shibu Soondri *v.* Basu Mati, I. L. R. 7 Cal., p. 191; Jadu Nath *v* Broja Nath, 12 B. L. R. 385.)

Grand-mother entitled to share.

28. The widowed mother or grandmother cannot demand a share until the sons or grandsons proceed to effect a partition. Until shares are allotted to them on partition, they can claim nothing beyond maintenance.

29. If a widowed mother has only one son, she can never claim a share But if the son dies, and his sons come to a division, then, according to the Bengal authorities, she would be entitled to a share with her grandsons.

Mother a[illegible] grandmot[illegible] cannot de-mand part[illegible] tion The[illegible] can only claim sha[illegible] when parti[illegible] tion takes place.

30. There are texts which declare that on partition after the father's death, brothers should give a fourth share to their sisters. But the wording of those texts show that they are mere moral precepts. Where there is a son, a daughter cannot have any legal right in the paternal wealth. (Dayabhaga, chap. III, sec. 2, paras. 38—39.)

SECTION III.

EXCLUSION FROM PARTITION.

1. Persons otherwise entitled to partition may be excluded on account of social misconduct or sinful acts or on account of bodily or mental infirmity. The result of the several texts, quoted and discussed in the Mitakshara, (chap. II, sec. 10) and in the Dayabhaga, (chap. V), is that

the following persons are excluded from the right to inheritance and partition.

Grounds of exclusion from inheritance.

1. Degraded persons.
2. Their sons born after degradation.
3. One excluded from caste.
4. One who has renounced his religion.
5. A mad man.
6. An idiot.
7. An impotent person.
8. A blind man.
9. One who is lame.
10. One who is deaf or dumb or wanting in an organ.
11. One who is afflicted with a loathsome disease.
12. One who is an enemy to his father.

Excluded persons entitled to maintenance.

2. With the exception of degraded persons and their sons, all the rest are entitled to maintenance for life. Their wives are also entitled to maintenance. Their sons, if free from defect, may take their proper shares, as if the father were dead.

3. If the defect is removed by medicine or by penance, then the disqualified person becomes entitled to his proper share, like a posthumous son born after separation. This can very well take place consistently with the principles of the Mitakshara. (Mit. chap. II, Sec. 10, para. 7.) But, according to the Dayabhaga theory, the right to paternal wealth accrues at the moment of the father's death. If, at that time, any of the sons be disqualified, then he cannot take anything; and the entire estate vests in the other legal heirs. Even if the cause of disqualification be afterwards removed, it is difficult to see how he can get any share from those in whom the property has already vested. But Sree Kishen, in his commentary with reference to para. 14, chap. V, of the Dayabhaga, says that if the malady be cured after partition, the excluded person becomes entitled to his share. Perhaps his idea is, that the disease being cured is conclusive evidence of the fact that it was not incurable; and the exclusion being, therefore, founded on a mistake of fact must be voidable. On the same ground, the degraded person would take his share, if he performs penance.

Aurasa son of a disquali-

4. The Aurasa son of a disqualified person may, if free from defect, take his proper share, provided the exclusion

of the father is not on account of degradation unremoved by penance. The adopted son of a disqualified person can take nothing. (See Mitakshara, chap. II.)

fied person may inherit but not an adopted son

5. The Aurasa son of a disqualified person must take in his own right. If he is born after the opening of the succession, then he cannot take any thing. In the case of Kaly Das *v.* Kishen Das (2 B. L. R p. 115) the plaintiff was the grandson of the original owner of the property. When the plaintiff's grandfather died, he had an only son—the plaintiff's father—who was born blind. His estate, therefore, devolved on his nephew. The blind son who was excluded, had a son born to him several years after the death of his father. The grandson Kishen Das sued the sons of the nephew of his grandfather who were in possession of his property. It was held by a Full Bench that as the succession vested in the nephew, it would not be divested in favour of the proprietor's grandson born afterwards. This ruling has been followed by the Bombay High Court in Bapuji *v.* Pandurang, I. L. R 6 Bom. 616.

Estate once vested can never be d vested

6. The Hindu law as to exclusion from heritage has been rendered inoperative, in a great measure, by Act XXI of 1850 which was passed by the Legislature for the benefit of native converts to Christianity By that Act, it is provided that "so much of any law or usage now in force, in the territories subject to the Government of the East India Company, as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter."

Act XX 1850

7. The Act thus repeals all those rules of Hindu Law which exclude the following persons from inheritance:

1. One who has renounced his religion.
2. One who is excluded from the communion of his religion.
3. One excluded from caste.

8. It is generally supposed or taken for granted that under Act XXI of 1850, degradation is now no longer a disqualifying cause. But on going carefully through the Act, it would appear that there is nothing, said in it,

The pr vailing i that deg dation i followed forfeitu

the following persons are excluded from the right to inheritance and partition.

Grounds of exclusion from inheritance.

1. Degraded persons.
2. Their sons born after degradation.
3. One excluded from caste.
4. One who has renounced his religion.
5. A mad man.
6. An idiot.
7. An impotent person.
8. A blind man.
9. One who is lame.
10. One who is deaf or dumb or wanting in an organ.
11. One who is afflicted with a loathsome disease.
12. One who is an enemy to his father.

Excluded persons entitled to maintenance.

2. With the exception of degraded persons and their sons, all the rest are entitled to maintenance for life. Their wives are also entitled to maintenance. Their sons, if free from defect, may take their proper shares, as if the father were dead.

3. If the defect is removed by medicine or by penance, then the disqualified person becomes entitled to his proper share, like a posthumous son born after separation. This can very well take place consistently with the principles of the Mitakshara. (Mit. chap. II, Sec. 10, para. 7.) But, according to the Dayabhaga theory, the right to paternal wealth accrues at the moment of the father's death. If, at that time, any of the sons be disqualified, then he cannot take anything; and the entire estate vests in the other legal heirs. Even if the cause of disqualification be afterwards removed, it is difficult to see how he can get any share from those in whom the property has already vested. But Sree Kishen, in his commentary with reference to para. 14, chap. V, of the Dayabhaga, says that if the malady be cured after partition, the excluded person becomes entitled to his share. Perhaps his idea is, that the disease being cured is conclusive evidence of the fact that it was not incurable; and the exclusion being, therefore, founded on a mistake of fact must be voidable. On the same ground, the degraded person would take his share, if he performs penance.

Aurasa son of a disquali-

4. *The Aurasa son of a disqualified person may, if free* from defect, take his proper share, provided the exclusion

of the father is not on account of degradation unremoved by penance. The adopted son of a disqualified person can take nothing. (See Mitakshara, chap. II.)

fied person may inherit but not an adopted son

5. The Aurasa son of a disqualified person must take in his own right. If he is born after the opening of the succession, then he cannot take any thing. In the case of Kaly Das *v.* Kishen Das (2 B. L. R p. 115) the plaintiff was the grandson of the original owner of the property. When the plaintiff's grandfather died, he had an only son—the plaintiff's father—who was born blind. His estate, therefore, devolved on his nephew. The blind son who was excluded, had a son born to him several years after the death of his father. The grandson Kishen Das sued the sons of the nephew of his grandfather who were in possession of his property. It was held by a Full Bench that as the succession vested in the nephew, it would not be divested in favour of the proprietor's grandson born afterwards. This ruling has been followed by the Bombay High Court in Bapuji *v.* Pandurang, I. L. R 6 Bom. 616.

Estate once vested can never be d vested.

6. The Hindu law as to exclusion from heritage has been rendered inoperative, in a great measure, by Act XXI of 1850 which was passed by the Legislature for the benefit of native converts to Christianity. By that Act, it is provided that "so much of any law or usage now in force, in the territories subject to the Government of the East India Company, as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter."

Act XX. 1850.

7. The Act thus repeals all those rules of Hindu Law which exclude the following persons from inheritance:

1. One who has renounced his religion.
2. One who is excluded from the communion of his religion.
3. One excluded from caste.

8. It is generally supposed or taken for granted that under Act XXI of 1850, degradation is now no longer a disqualifying cause. But on going carefully through the Act, it would appear that there is nothing, said in it,

The p vailing that de dation f followe forfeitu

ice the sing of t XXI of 50.

Degrada- n sup- sed to be uivalent exclusion m caste.

Not so; it status.

about degradation. From the judgments of the Privy Council, and the High Court, in certain cases, it would seem that degradation is considered as something equivalent to exclusion from caste. But if that is the view taken of the nature of degradation, then there can be no doubt that it is erroneous. Degradation is a *status* caused by certain causes. Whether a man is degraded or not, can be ascertained only by enquiring whether he has done any of those crimes by which degradation is caused. When a man becomes degraded, then ordinarily he is not allowed to take a part in any religious ceremony; and he is also excluded from mess. But if the degraded person be too powerful, or if the religious discipline of the society is too lax, then the degraded person may not be excluded from caste. Exclusion from the communion of the religion, and exclusion from caste are the usual consequences of degradation. But it is a great mistake to suppose that degradation is equivalent to exclusion from caste.

Hindu con- ts to ristianity saved by other visions tained in Act.

9. Although the effect of degradation is not saved by Act XXI of 1850, yet it seems that a Hindu converted to Christianity or Mahomedanism would not forfeit any right either by his conversion or by his subsequent acts. After conversion, the convert would not be bound by the Hindu religion; and he cannot be degraded in the eye of the law except by his new religion. Change of religion being no longer a disqualifying cause, it must also be admitted that such acts as are the necessary consequence of the change cannot deprive the convert of any of his rights. The result is, that a Hindu who becomes a convert to Christianity or Mahomedanism, is saved from forfeiture even though he does such acts as lead to degradation.

10. Under what circumstances a man becomes degraded is question of religion and not of law. The Hindu law says, that the degraded person, who would not perform the penance prescribed by the Shastars, forfeits his rights. But what is degradation? that is a question of the religion professed by the person.

11. If a native convert brings any suit to recover his share of the family property, his co-sharers cannot say that either by his conversion or by his subsequent acts, he has forfeited his rights. For the convert would say, "I have, it is true, renounced the Hindu religion. But under Act XXI of 1850, I have not lost any right on that

account only. It is true also, that after my conversion, I have done such acts as lead to degradation, according to the Hindu religion. But the Hindu religion is something different from Hindu law. I retain my rights under Hindu law as modified by Act XXI of 1850; but I cannot become degraded, by doing such acts as are forbidden by the Hindu religion which I have renounced.

12. There is no express saving clause in Act XXI of 1850 in favour of degraded persons; and, considering the mischievous* and anomalous results which would arise if the effect of degradation be, as it is now held to be, saved by Act XXI, there can be no objection towards adopting the view of law set forth above.

13. The right of the son of a degraded person is not saved by Act XXI of 1850 or by any other act. Unless the view of law set forth above be accepted, the son of a convert cannot claim any right to inherit as heir to a collateral relation of his father or mother. According to the view taken in this treatise, a convert cannot be regarded as a degraded person in the eye of law.

14. It has been stated that change of religion is a disqualifying cause according to Hindu law. Vashishtha says—

अनंशास्त्वाश्रमान्तरगताः ।

(Mit. chap. II, sec. X, para. 3.)

Change of Asrama which leads to forfeiture means change of religion.

From this and other texts quoted in the Mitakshara as well as in the Dayabhaga, it appears that a change of Asrama is a disqualifying cause. Although the word Asrama is properly applied to the four religious orders, yet in these passages change of Asrama must be taken to mean change of religion. For mere change of Asrama without change of religion does not operate as a disqualifying cause. A Brahmachari or reader of the Vedas, does not forfeit any of his rights by becoming a householder. For the change of Asrama is not accompanied by any change in religious observances, except to the extent that a householder being a married man can per-

* For instance under the Widow Marriage Act, a Hindu widow who re-marries forfeits all her rights in the property inherited by her from her first husband But if instead of marrying, she becomes unchaste, then, according to the view of law now generally accepted, she does not forfeit any right. Kery Kalitani v Moni Ram Kolita, 13 B. L. R. p. 1.

form certain religious acts which a Brahmachari cannot do. But, if a householder enters into the Banaprastha order, then the change of order works as a forfeiture of existing rights. For the religious observances of a Banprastha are altogether different from the observances of a householder. Change of Asrama in the text of Vashistha quoted above, therefore, means change of religion.

15. Exclusion from caste is in itself a disqualifying cause. (Dayabhaga, chap V, para. 3.)

nsanity ed not be ngenital.

16. Insanity need not be congenital; and it has been held that it need not be incurable in order to operate as a disqualifying cause, (Braja Bhukun Lal *v.* Bichan Dobey, 9 B. L. R. 204; Dwarka Nath *v.* Mohendra Nath, 9 B. L. R. 198; Bodh Narain Sing *v.* Omra Sing, 13 M. I. A. 519 Ram Sahaya *v.* Lalla Laljee Sahvi, I. L. R. 7 Cal. 153.

diots.

17. An idiot is one who is, and who has been from his birth unable to learn the Vedic mantras (Dayabhaga, chap. V, para. 9). According to the Mitakshara an idiot is one whose mental functions are disordered (Mit. chap. II, sec. X, para. 2). It has been held that the degree of mental incapacity which amounts to idiocy is not utter mental darkness. It is sufficient, if the person is, and has been from his birth, of such an unsound and imbecile mind as to be unable to manage his own affairs. (Tirumangal *v.* Rama Sawmy, 1 Mad. H. C. 214)

mpotent rsons.

18. Impotence must be congenital in order to disqualify a person from taking a share on partition. The word in the original is क्लीब which means a person of the neuter sex as explained in the Mitakshara, chap. II, sec. X, para. 2.

Blind and af.

Blindness and deafness must be congenital in order to operate as disqualifying causes. Murarji Gokuldas *v.* Parvati Bai, I. L. R. 1 Bom. 177.

Persons o are lame.

19. Lameness is another cause of exclusion. The word in the original is पङ्गु which means one who cannot walk. There is no text which declares that lameness should be congenital. But the incapacity to walk must be complete and not partial.

Persons thout an gan.

20. Those who are without an "Indriya" or organ are excluded.

Indriya means organ of the body; hence Nirindriya means one who has not one or other of the organs of the body. (Mit. chap. II, sec. X.)

Persons suffering from an incurable malady.

21. One who is suffering from an incurable disease such as consumption is excluded from participation in the paternal wealth. But the strictest proof is required that the disease is incurable (Issar Chandra *v.* Rawa Dassee. 2 W. R. 125.)

22. According to Sreekishen the disease must be congenital, (D. K. S. chap. III, para. 11.)

23. If the disease is subsequently cured by medicine, then the excluded person may claim his share, probably on the ground that his disease was not incurable (Mit. chap II, sec. X, para. 7; Sreekishen on the Dayabhaga, chap. V, para 10).

Leprosy.

24. Persons suffering from an aggravated form of leprosy are excluded. (Ananta *v.* Ramabai, I. L. R. 1 Bom. p. 554.)

25. One already separated from his co-heirs is not deprived of his allotment by any disqualifying cause arising subsequently to partition. (Mit. chap. II, sec. X, para. 6.)

26. The masculine gender is not used restrictively in the words outcast and the rest. It must be, therefore, understood that the wife, the daughter, the mother, or any other female, being disqualified for any of the defects which have been specified, is likewise excluded from participation. (Mit. chap. II, Sec. X, para. 8.)

27. In order to enable the Sanskrit-knowing readers to remember the substance of the law dealt with in this section, the following texts are quoted here in original:

क्लीवोऽथ पतितस्तज्जः पङ्गुरुन्मत्तको जडः ।
अंधोऽचिकित्स्यरोगार्त्ता भर्त्तव्यास्ते निरंशकाः ॥
Jajnyavalkya, II, 141.

पितृद्विड् पतितः षंढो यश्च स्यादौपपातिकः ।
औरसा अपि नैतेऽंशं लभेरन् क्षेत्रजाः कुतः ॥
Narada, XIII, 21.

अनंशौ क्लीवपतितौ जात्यन्धबधिरौ तथा ।
उन्मत्तजडमूकाश्च ये च केचिन्निरिन्द्रियाः ॥
Manu, IX, 201.

मृते पितरि न क्लीव कुष्ठ्युन्मत्त जडान्धकाः ।
पतितः पतितापत्यं लिङ्गी दायांश भागिनः ॥
तेषां पतित वर्ज्येभ्यो भक्तवस्त्रं प्रदीयते ।
तत्सुताः पितृदायांशं लभेरन् दोषवर्जिताः ॥
Devala.

Section IV.

WHAT PROPERTY IS LIABLE TO PARTITION.

Ancestral property.

1. Property acquired by the common ancestor of all the coparceners is liable to partition.

Jointly acquired property of the coparceners.

2. Property jointly acquired by all the coparceners is liable to partition. Vrihaspati says—

समवेतैस्तु यत् प्राप्तं सर्व्वे तत्र समांशिनः ।

(Mit. chap. I, Sec. 4, para. 15.)

Property acquired by a single member but thrown into the common stock.

3. Property acquired by any single member without the aid of joint funds may still be liable to partition, if thrown into the common stock by the acquirer. (Haree Pershad *v.* Sheo Dyal, 3 I. A. 259; Sham Narain *v.* Court of Wards, 20 W. R. 179)

Gains of science.

4. According to the texts of Smritis, the gains of science acquired without any expense to the family are not partible except where the family of the acquirer is maintained by the other members, during his absence. Considering the principles laid down in paras. 46, 47, 48, 49 of sec. I, chap. VI, Dayabhaga, it seems that the separate acquisitions of a member of a joint family are not necessarily partible on the ground that the acquirer was maintained at the family expense, while he received his education. When the family of the acquirer had to incur any extra expenditure in order to give him education, the gains of that education would, it seems, be partible under the Bengal law. (Dayabhaga, chap. VI, sec. I, para. 48.)

In Dhunookdharee Lal *v.* Gunpat Lal, (10 W. R. 122). Mr. Justice Mitter said :—"The plaintiff's case in the Court below was, that the defendant received his education from the joint estate, and that he is consequently entitled to participate in every property that has been acquired by the defendant by the aid of such education. But this contention is nowhere sanctioned by the Hindu law." These observations were in a great measure approved by the Privy Council in Pauliem *v.* Pauliem in which the following passage occurs :—" This being their Lordships view, it does not become necessary to consider whether the somewhat startling proposition of law put forward by the appellant—which stated in plain terms amounts

to this: that if any member of a joint family receives *any education whatever* from joint funds, he becomes for ever after incapable of acquiring by his own skill and industry any separate property—is or is not maintainable. Very strong and clear authority would be required to support such a proposition. For the reason that they have given, it does not appear to them necessary to review the text books or the authorities which have been cited on the subject. It may be enough to say that, according to their Lordships' view, no texts which have been cited, go to the full extent of the proposition which has been contended for. It appears to them, further, that the case reported in the 10th volume of Sutherland's Weekly Reporter—Dhunookdharee Lall *v.* Gunpat Lall in which a judgment was given by Mr. Justice Jackson and Mr. Justice Mitter both very high authorities—lays down the law bearing upon this point by no means as broadly as it is laid in the two cases which have been quoted as decided in Madras: the first being to the effect that a woman adopting a dancing girl and supplying her with some means of carrying on her profession was entitled to share in her gains, (Cholakonda Alasani *v.* Chala Cunda Ratun Chalam, 2 Mad. H. C 56); and the second to the effect that the gains of a Vakil who has received no special education for his profession are to be shared in by the joint family of which he was a member, (Durvasala *v.* Durvasala, 7 Madras H. C. 47); decisions which have been to a certain extent acted upon in Bombay, (Bai Mancha *v.* Narotam Das, 6 Bom. 1. It may hereafter possibly become necessary for this Board to consider whether or not the more limited and guarded expression of law upon this subject of the Court of Bengal is not more correct than what appears to be the doctrine of the Courts of Madras." (Pauliem *v.* Pauliem, I. L. R. 1 Mad. 262.)

Conflicting decision.

In a later case, it has been held by the Bombay High Court that the view of law taken by Mr. Justice Mitter is not strictly accurate. The texts do certainly establish it as a general rule of Hindu law that the ordinay gains of science are divisible when such science has been imparted at the expense of the family. But it is laid down by the Bombay High Court that when the texts "speak of the science, they intend the special branch of science which is the immediate source of the gains, and not the

elementary education which is the necessary stepping-stone to the acquisition of all science." Laksman Mayaran v. Jamna Bai, I. L. R. 6 Bomb p 243.)

5. Whatever is acquired by a single member, without the use of joint funds, is the self-acquired property of that member; and such property is not partible according to the Dayabhaga.

Certain kinds of self-acquired property liable to partition according to Mitakshara.

According to the Mitakshara certain kinds of self-acquired property are liable to partition. Property received as a gift from a stranger by a single coparcener is liable to partition according to Vijyaneshwar. (Mit. chap. I, Sec. II, para. 7)

Property acquired with trifling aid from joint funds.

6. A separate property acquired by a single member, with some trifling aid from joint funds, is partible. But the acquirer takes a double share (Dayabhaga, chap. VI, Sec. I, para. 14; Mit. chap. I, Sec. IV, para. 29.)

7. If the joint family property be improved by a single member, it still continues to be equally partible. Jajnyavalkya says—

सामान्यार्थे समुत्थाने विभागस्तु समः स्मृतः ॥

(Mit. chap. I, Sec. V, para 31.)

Proprty lost and recovered.

8. If ancestral property be lost and afterwards recovered by a single member, with the express or implied consent of the other coparceners, but without the aid of joint funds, it belongs to the recoverer, according to the following text of Manu quoted in the Mitakshara, chap. I, Sec. V, para. 11.

पैतृकन्तु पिताद्रव्य मनवाप्तं यदाप्नुयात् ।
न तत्पुत्रै र्भजेत् सार्द्धमकामः स्वयमर्ज्जितं ॥

Manu, I, v. 209

[If the father recover wealth, not recovered before, he shall not, unless willing, share it with his sons, for in fact it was acquired by him]

But Sankha says—

पूर्व्वं नष्टां तु यो भूमि मेकश्चेदुद्धरेत् क्रमात् ।
यथा भागं लभन्तेऽन्ये दत्वांशंतु तुरीयकं ॥

Mit. chap I, Sec. IV, para. 3.

[Land (inherited) in regular succession, but which had been formerly lost, and which a single heir shall recover solely by his own labour, the rest may divide according to their due allotments, having first given him a fourth share.]

9. Vijyaneshwar has not reconciled these texts. But there can be no doubt that, according to him, if the father be the recoverer, he may not give a share to his sons against his will. But if the recovery be made by any other co-owner, then the recoverer gets only an additional fourth part.

Vijyaneshwar has not reconciled these texts.

10. In the mode of reconciliation apparently intended by Vijyaneshwar, it is taken for granted that sons have a right to demand partition of ancestral property against the father's will. Jimuta, therefore, reconciles these texts by laying down that the text of Manu contains the general rule, and the text of Sankha applies only to lands. (Dayabhaga chap. VI, sec. II, paras 31—37.)

Jimuta's r conciliatio

11. Though the general rule of Hindu law is, that ancestral property is divisible among all the co-heirs, yet there are some exceptions to that rule. The most important instance is a Raj or sovereignty, and which by special family custom descends to a single member. Many of the cases of estates which descend by primogeniture appear to rest on the nature of the estate itself, as being a sort of sovereignty which from its constitution is impartible. But family custom alone is sufficient, even if the estate is not of the nature of a Raj (Rawut Urjoon Sing *v.* Rawut Ghaneshyan, 5 M I. A. 169; Chowdry Chintamun Sing *v.* Nowloka, 2 I A. 263).

Impartib Raj

12. An estate which is in the nature of a Raj may yet be partible (Giridharee *v.* Koolahul Sing, 2 M. I. A. p. 344).

13. A family custom of descent by primogeniture cannot be revived, if once abandoned. (Raj Kishen Sing *v.* Ramjay Surma, I. L. R 1 Cal 186.)

14. The eldest son, who succeeds by primogeniture to an impartible Raj, is absolute owner of the whole income of the zemindaree, and its savings and investments acquired with such savings. Consequently none of his coparceners, lineal or collateral, can have any right to control him in the disposal of the income. Alienations and encumbrances made by the Raja, for the time being, are therefore good for his life. Even the eldest son who would succeed him ultimately, cannot in the lifetime of the father, sue to set aside such alienations By birth he becomes a joint owner; but the estate being impartible he cannot demand partition from his father.

Thakoor Kapil Nath v. Govt. of Bengal.

15. In Thakoor Kapil Nath *v.* The Government (13 B. L. R.) it was held by the High Court of Bengal that the sons do not acquire any interest by birth in an impartible Raj held by the father at the time. If the ruling laid down by the Bengal High Court be correct, then an impartible Raj must be absolutely at the disposal of the Raja for the time being, unless it appears that his power is curtailed by custom. According to the Madras High Court decisions, sons acquire by birth an interest in ancestral Raj in the possession of the father. But as the eldest son alone would succeed on the death of the father "the rights of the others are reduced to rights of survivorship to the possession of the whole, dependent upon the same contingency as the rights of survivorship of coparceners *inter se* to the undivided share of each; and to a provision for maintenance in lieu of coparcenary shares. (Yerreymula Gavuri Devamma *v.* Ramandora, 6 Mad. H. C. 105.)

Madras decision on the point.

Nature of the estate possessed by the Rajah for the time being.

16. The result is, that if the holder of an impartible zemindaree has sons or other coparceners, then, under Mitakshara law, he is in much the same position as a widow inheriting the estate of her husband. His acts or alienations are good for his life; but not beyond it At his death they are voidable at the option of his successor if made without legal necessity. (Venkata Neeladry *v.* Enoogunty, 1 Mad Dec. 281; Ram Chandra *v.* Jaganada, Mad. Dec. of 1861; 162.) According to the decisions of the Bengal High Court, the impartibility of an inheritance does not, as a matter of law, render it inalienable, (Raja Udaya Adiyta Dev *v.* Jadub Lal Aditya, I. L. R. 8 Cal. p. 199.)

Service tenures.

17. Another case, in which the property is *primâ facie* impartible, is where it is allotted by the State to a person in consideration of the discharge of particular duties, or as payment for an office, even though the duty or office may become hereditary in a particular family. An instance of the sort is to be found in the case of lands, held under Ghatwali tenure in Beerbhoom which are hereditary, but have been held to be impartible. (Hara Lal Sing *v.* Jorawar Sing, 6 S D 169.) I may, however, state here from personal knowledge, that in actual practice Ghatwali lands are generally divided among brothers, though the tenure itself retains its unity, and only one of the brothers is put forward as Ghatwal.

18. In Madras where the office of Curnum or village accountant has become hereditary the land attached to the office is not liable to division. (Alyumalammul *v.* Venkatoovien, 2 Mad. Dec. 85.)

19. In Bombay there are numerous revenue and village offices such as deshmukh, deshpandya, desai and patel, which are similarly remunerated by lands originally granted by the State These lands have, by lapse of time, come to be considered as purely private property of the family which holds the office, though they are subject to the obligation of discharging its duties, and defraying all necessary expenses. Land of this character, though not invariably, is so frequently partible, that it has been decided that in a suit for partition of such property, its nature raises no presumption that it is indivisible. (Adrishappa *v.* Gurshidappa, I. L R. 4 Bom 494.)

20. Savings made by an ancestor out of the income of an impartible estate are divided as ancestral property. (5 Mad. H. C. 41.)

SECTION V.

IMPARTIBILITY OF RELIGIOUS ENDOWMENTS.

According to Hindu lawyers an idol cannot be the owner of any property.

1. According to the principles, accepted by Hindu Jurists, an idol cannot be the owner of any property. For if a gift is made in favour of an idol, the property continues to belong to the giver. Dedication by a votary to an idol does not divest him of his right; nor does it create any right in favour of the god who is worshipped. The only effect produced by the dedication is an invisible one, *viz.*, that result for which the sacrifice or dedication is made. There may be sentient gods; but the gods to whom sacrificial offerings are made are not sentient beings, and they cannot be the owner of any property. If the gods became owners of the things offered to them, then the votary would become guilty of theft by appropriating those things, either for his own benefit or for any one else. (Vide Sulpani's Shrada Viveka)

But the Hindus generally make dedication in favour of idols in th

2. However that be, the general belief and practice of the Hindu community is not in accordance with the speculative doctrines maintained by their lawyers; and

the Courts of Law have very properly given effect to gifts made by Hindus in favour of their gods.

3. Debutter property which is dedicated in favour of an idol cannot be partitioned. Where nothing is said in the grant as to the succession, the right of management passes by inheritance to the natural heir of the donee. (Chutter Sen's case, 1 S. D. 180)

4. The property passes with the office; and neither it nor the management is divisible among the members of the family. (Rajendra Datta *v.* Shamchand Mittra, I. L. R. 6 Cal. p. 118.)

5. In the text of Vyasa quoted in para. 25, sec. II, chap. VI of the Dayabhaga, the word याज्य is explained by Jimutavahana as equivalent to "house of worship" Thus according to Jimuta, houses of worship are not divisible. It follows on the same principle, that property dedicated to an idol absolutely is not partible.

6. Vijyaneshwar has explained the word याज्य in the text of Vyasa in a different way. But it seems that he deduces the same result from the word योगक्षेम in the text of Manu quoted in para. 16, sec. IV, chap. 1 of the Mitakshara.

7. If it be admitted that an idol can be the proprietor of any property, the impartibility of that property would follow independently of any text.

8. Property which is not absolutely dedicated, but upon which a lien is created in favour of an idol retains its heritable character, and can be divided by the co-owners. (Sonatun Bysak *v* Jugut Soondree Dassee, 8 M. I. A. p. 66; Ashu Tosh Dutta *v.* Doorga Charan Chatterjee, I. L. R. 5 Cal. p. 438)

9. A right to worship an idol by turns is a periodically recurring right, and a suit for establishing such a right must be brought within 12 years from the time when the plaintiff is first refused the enjoyment of the right. Art. 131, Sched. II, Act XV of 1877; Eshan Chandra Roy v. Man Mohini Dasee, I. L. R. 4 Cal. 683.)

10. A suit for possession of an idol brought more than six years after dispossession has been held to be barred by limitation. (I. L. R. 4 Cal. 683.) Idols are property in the eye of law; and the Courts have jurisdiction to entertain suits regarding possession of idols. (Subboray Gurakal *v.* Chellappa Mudali, I. L. R. 4 Mad. p. 315.)

SECTION VI.

AT WHOSE INSTANCE AND AT WHAT TIME CAN PARTITION BE MADE.

1. According to the Mitakshara sons, by birth, acquire a right in the paternal wealth. So far as ancestral property is concerned, the rights of the father and the son are equal It follows therefore that, even in the lifetime of the father, sons can at any moment demand partition. (Mit. chap. I, sec. V, para. 8.)

Mitakshara Law.

2. In the lifetime of the father, the sons cannot demand partition of his self-acquired property, except under the following circumstances :—

1. When the father is indifferent to wealth and disinclined to pleasure ; and the mother is passed child-bearing.
2. While the mother is capable of bearing more issue, a partition is admissible by the choice of the sons, though the father is unwilling, provided the father is addicted to vice, or afflicted with a lasting disease.

(Mit. chap. I, sec. II, para. 7.)

3. The father can effect a partition at any time of ancestral as well as self-acquired property. (Mit. Ib.)

4. After the death of the father, partition can take place at any time, at the instance of any of the co-owners.

5. A grandson whose father is dead can demand partition from the grandfather according to the Mitakshara. A great-grandson whose father and grandfather are dead can also demand partition. But the son of a great-grandson whose immediate paternal ancestors are dead cannot demand partition from the father of his deceased great-grandfather.

6. According to the Dayabhaga, sons acquire no right whatever by birth ; and they cannot demand partition against the will of the father. But the father can effect a partition of his self-acquired property at any time. He is also absolute master of ancestral property. But he cannot make a partition of ancestral property among his sons, so long as there is any reasonable expectation of his having more sons. (Dayabhaga, chap. I, para. 45.)

Dayabhaga Law.

7. Partition is quite optional with the coparceners. Manu says—

एवं सहवसेयुर्व्वा पृथग्वा धर्म्मकाम्यया ।

Manu, IX, 111.

riod of ation.

It follows therefore that lapse of time is in itself not a bar to a suit for partition. But the Statute of Limitation will operate from the time that a plaintiff is excluded from his share, and that such exclusion becomes known to him. (Act XV of 1877, Sched. II, Art. 127)

8. If any co-sharer be a minor still a partition may take place. A suit cannot be brought by or on behalf of a minor to enforce partition, unless on the ground of malversation, or some other circumstances which makes it his interest that his share should be set apart and secured for him. (Damoodar *v.* Senabaty, I. L. R. 8 Cal. 537.)

reement ng copar- rs not fect par- how inding

9. If the co-sharers enter into an agreement binding themselves and their representatives not to effect a partition, neither their heirs nor the purchaser from any co-sharer or his heir can be bound by the agreement. (Anand Charan Ghose *v* Pran Kishta Datta, 3 B L. R. 14; Rajendra Datta *v* Sham Chand Mittra, I. L. R. 6 Cal. p. 106.) So far as the heirs of the parties to the agreement are concerned, the ruling follows from the principle of Hindu Law that ownership is extinguished by death; and the heir takes not as representative, but by the operation of the law of cause and effect, the existence of the heir at the time of the owner's death being the cause which vests in the heir the right to the property of the deceased.

Section VII.

MODE OF PARTITION.

takshara

1. When the father makes a partition of ancestral property among his sons, then according to the Mitakshara, they all take equal shares with him. When the father makes a partition of his self-acquired property, he may take two shares to himself according to the same authority, (Mit. chap. I, sec. V, para. 2) and may at his option give either equal shares to all sons, or he may make

such unequal partition as is allowed by law. (Mit. chap. I, sec. V, para. 6.) Where partition takes place after the father's death, all the brothers take equal shares. (Mit. chap. I, sec. III, para. 1; Dayabhaga, chap. III, sec. II, para. 27.)

2. In former times, unequal partition was allowed to a certain extent. But Vijyaneshwar says:—"True this unequal partition is found in the sacred ordinances; but it must not be practised, because it is abhorred by the world; since that is forbidden by the maxim—

अस्वर्ग्यं लोकविद्विष्टं धर्म्ममप्याचरेन्न तु ॥

As the practice of [offering bulls] is shunned on account of popular prejudice, notwithstanding the injunction "Offer to a guest who is proficient in the Vedas a bull or a goat," and as the slaying of a cow is for the same reason disused, notwithstanding the precept, "Slay a barren cow as a victim to Mitra or Varuna."

3. If there be several coparceners some of whom stand in the relation of nephews to the others, then the nephews, whatever be their number, take the shares of their fathers. (Mit. chap. I, sec V, para 2) In making a partition of joint family property governed by the Mitakshara, it is not necessary to enquire the dates of birth or of death of any predeceased or living member. The relation between the coparceners being known, their shares are determined by the simple rule that among coparceners who are sons of different fathers, the shares are according to the fathers. The law of the Dayabhaga is materially different.

The law of the Dayabhaga on the subject.

5. According to the Dayabhaga, sons cannot claim partition so long as the father lives. But the father can effect a partition among his sons at any time. The legal power of the father is as complete over ancestral as it is over his self-acquired property. But as there are certain texts declaring that the power of the father is limited in ancestral property, Jimuta holds that the father incurs sin, if he makes a partition of such property, so long as there is any possibility of his having more sons, or if he makes an unequal partition, not warranted by the Shastars.

6. According to Jimuta partition can neither destroy nor create a legal right. The father can by partition divest himself of his legal right; and transfer the ownership to his sons. But partition in that case evidently partakes

of the nature of gift. As the father can undoubtedly make a gift of ancestral property, even in favour of a stranger, there can be no doubt that the father can make an unequal partition of such property among his sons, though by doing so, he incurs sin.

7. If the father makes a partition, in his lifetime, then he can reserve to himself two shares out of ancestral property. Vrihaspati says—

जीवद्विभागे तु पिता गृह्णीतांशद्वयं स्वयं।

[If partition be made, in his lifetime, then the father may reserve to himself two shares]

Dayabhaga, chap. II, Sec. 35.

To the same effect is Narada—

द्वावंशौ प्रतिपद्येत विभजन्नात्मनः पिता॥

According to Jimuta, these texts apply to ancestral property. But as to self-acquired property, the power of the father is unlimited, according to Jimuta. As an authority in support of his view, Jimuta quotes the following text of Vishnu :

पिता चेत् पुत्रान् विभजेत्तस्य स्वेच्छा स्वयमुपात्तेऽर्थे; पैतामहे तु पिता पुत्रयोस्तुल्यं स्वामित्वं।

Dayabhaga chap. II, para. 16.)

8. After the father's death, partition must be equal among the sons If any of the sons die before partition, without leaving male issue, then his share goes to the next heir—widow, daughter or mother. If there be no heir down to the mother, then his share goes to his brothers. But if any of the brothers died before him, leaving male issue, then the nephews would not get any share. In this respect, the law of the Dayabhaga is materially different from that of the Mitakshara.

9. In a case like the above, the surviving brothers and nephews would, according to the Mitakshara, remain in possession of the whole estate, as if the brother who died without male issue, never existed. On effecting partition, according to the Mitakshara, the deceased coparcener, without male issue, is not taken into account at all. But, according to the Dayabhaga, it is necessary to ascertain what share the deceased had, and who were his next heirs, at the time of his death.

10. The law as to the right of the father's widows to a share on partition has been already discussed (see p. 229 *ante.*)

11. In practice, it is very often found that certain portions of the family property are held in severalty by the members; while the remaining portions are held jointly. But Manu says that "once only is partition made;" and it seems therefore that, except by amicable arrangement there cannot be a partial partition. The possibility, however, of partial partition is recognized in many cases. (Raj Kishore Lahoory *v.* Govinda Chandra Lahoory, I. L R. 1 Cal. p. 39.) See, however, Radha Charan Das *v.* Kripa Sindhu, I. L R 5 Cal. p. 474

Partial partition may be effected by amicable agreement.

12. Every suit for partition must embrace the whole property (Rutton Mony *v.* Broja Mohun, 22 W. R 333), and it is necessary that all those interested in the property or entitled to a share should be made parties (Prahed Sing v. Mt Lutchmunaboty, 12 W. R 256). The mother must be made a party (Laljeet Sing *v* Raj Coomar Sing, 20 W. R. 336).

A suit for partition must embrace the whole property.

13. Partition may take place without actual metes and bounds (Appovier *v* Ram Suba, 11 M. I. A. 75; Rewan Pershad *v.* Radha Beeby, 4 M. I. A. 137).

Partition may take place without metes and bounds.

14. Where there has been a partition, the presumption is, that it was a complete one; and that it embraced the whole of the family property. Therefore, if property is afterwards found in the exclusive possession of one member of the family; and it is alleged that such property is still liable to partition, the proof of the allegation rests upon the party who makes it. Narayan *v.* Nana Monohur, 7 Bom. 153.

Presumption as to partition being complete.

15. If at the time of partition, any part of the family property is overlooked or fraudulently kept out of sight, then on discovery, such property would be subject to distribution among the persons who were parties in the original partition or their representatives—that is, among persons to whom each portion would have descended as separate property (Lachmun Sing *v.* Sanawal Sing, 1 All. 543; Manu IX, 218; Mitakshara, chap. I, Sec 9, paras. 1—3; Dayabhaga, chap XIII, paras 1—3). But the former distribution will not be opened up (Dayabhaga, chap. XIII, para. 6). When, however, the whole scheme of distribution is fraudulent, and specially when it is in fraud of a

minor, it will be absolutely set aside. (Dayabhaga, chap. XIII, para 5; Moro Vishwanath *v.* Gunesh Vittal, 10 Bomb. 444.)

16. The following observations as to what constitutes partition are quoted from Mr. Mayne's Treatise in Hindu Law. "As to what constitutes a partition, it is undisputed that it may be effected without any instrument in writing Numerous circumstances are set out by the native writers as being more or less conclusive of a partition having taken place, such as separate food, dwelling or worship; separate enjoyment of the property; separate income and expenditure; business transaction with each other and the like. (Mit. chap II, Sec 12; Dayabhaga, chap. XIV.) But all these circumstances are merely evidence, and not conclusive evidence of the fact of partition. Partition is a new *status*, which can only arise where persons, who have hitherto lived in coparcenary, intend that their condition as coparceners shall cease. It is not sufficient that they should alter the mode of holding property. They must alter and intend to alter their *status*. They must cease to become joint owners, and become separate owners (Mooktakeshi *v.* Omabuty, 14 W. R 31 And, as, on the one hand, the mere cesser of commensality and joint worship, the existence of separate transactions (Rewan Pershad *v.* Radha Bibee, 4 M. I. A. 137) the division of income (Sonatun *v.* Jagat Sundri, 8 M I A. 66) the holding of land in separate portions (Ambika Dut *v.* Sukhmuni Kuar, I. L. R. 1 All. p. 437) do not establish partition unless such a condition was adopted with a view to partition; so on the other hand, if the members of the family have once agreed to become separate in title, it is not necessary that they should proceed to a physical separation of the particular pieces of their property." (Dayabhaga, chap. I, para. 6;) Appovier *v.* Ram Subbayan, 11 M. I. A 75).

17. A decree for partition dissolves the joint tenure from its date; and it does so equally, although the suit was not in terms a suit for partition (Jai Narain *v.* Girish Chandra, 5 I. A. 228).

18. It has been held that any arrangement by which one member of the family abandons his rights to a share amounts to a partition in respect to the property so abandoned. (Bal Krishna *v.* Savitri, 3 Bom. L. R. 54.) This

is quite in accordance with the doctrine usually held that a coparcener in a Mitakshara family cannot make a sale or gift of any share before partition But it has been shewn that although a coparcener cannot make a sale or gift of a share before partition, yet there is no reason whatever why he should not be able to alienate his undivided interest in the joint property. The right existing, the power of alienation follows necessarily. On either view the relinquisher must be held to be divested of his interest.

Section VIII.

REUNION AFTER PARTITION.

Joint ownership cannot be dissolved by the separation of a single member.

1. Any one coparcener may separate from the others. But no coparcener can compel the others to become separate among themselves According to the Mitakshara, the consequences of partition are so important that nothing could be more inequitable than to hold that the status of those who desire to live jointly can be affected by the acts of a single parcener. Considering the view of joint ownership held by Vijyaneshwar, it may seem that it must be dissolved whenever any one member separates. But there can be no doubt that, according to the Mitakshara, joint ownership may continue even after the separation of any single member. Vijyaneshwar and Jimuta agree in maintaining that reunion can take place only between father, brother and nephew,* (Mit. chap. II, sec. IX, para. 3; Dayabhaga, chap. XII, p. 4) It thus appears that on separation of any single member, the others still retain their original status. For, if it be supposed that joint ownership is destroyed by the separation of any single co-sharer, then, on such separation, the coparcenary would be destroyed for ever, where the coparceners are not related within such degrees as to render reunion possible.

How reunion is effected.

2. According to the Dayabhaga and the Mitakshara, reunion takes place only when a separated member who is

---

* विभक्तो यः पुनः पित्रा भ्रात्रा चैकत्र संस्थितः ।
पितृव्येणाथवा प्रीत्या स तु संसृष्ट उच्यते ॥

Vrihaspati cited in Dayabhaga and Mitakshara.

related as son, brother or nephew reunites. As to how reunion takes place, see the comment of Sreekishen with reference to para. 1, chap. XII of the Dayabhaga.

3. The authorities of the Mithila school take the words in the text of Vrihaspati, not as imparting a limitation, but as offering an example.

4. The Mayukha agrees in that view so far as to hold that other persons besides those named by Vrihaspati may reunite; for instance "a wife, a paternal grandfather, a brother's grandson, a paternal uncle's son, and the rest also." But it restricts the reunion to the persons who made the first partition.

5. It was stated in some Bengal cases, that where one brother separates from the others, and the latter continue to live as a joint family, it must be presumed that there has been a complete separation of all the brothers, but that those who continue joint have reunited. (Jadub Chandra *v* Benode Behari, 1 Hyde, 214; Petamber *v.* Harish Chandra, 15 W. R. p. 200; Kesav Ram *v.* Nunda Kishore, 3 B. L. R. 7.) Considering the Dayabhaga theory of joint ownership, it does not necessarily follow that a coparcenary is destroyed by the separation of a single member. Then again, Jimuta like Vijyaneshwar holds that there can be no reunion except with father, brother and uncle. And if it be said that a coparcenary is destroyed by the separation of a single member, then it cannot be restored by reunion, where the coparceners are further removed from the common ancestor.

Presumption is against reunion.

6. After partition, the presumption would be against a reunion. To establish it, it is necessary to show, not only that the parties already divided, lived or traded together, but that they did so with the intention of thereby altering their status, and of forming a joint estate with all its usual incidents. (Pran Kishen *v.* Mothura Mohun, 10 M. I. A. 403.)

Effect of reunion.

7. The effect of a reunion is to replace the reuniting coparceners very nearly in the same position as they would have been, if no partition had taken place. According to the Mitakshara, the share of a reunited coparcener dying, without male issue, goes to the reunited coparceners, and not to the widow or daughter of the deceased. So far reunion restores the original status. But if among the reunited coparceners there be brothers of the whole

Mitakshara law.

blood, and also brothers of the half blood, then the brothers of the whole blood take the share of the deceased. If again, there be divided brothers of the whole blood and reunited brothers of the half blood, then they all stand on the same footing. In these respects reunion creates a new state of things altogether. The property of the deceased does not go by survivorship or by heirship but by a new law altogether.

Dayabhaga on the effect of reunion.

8. According to the interpretation put on the text of Dayabhaga by the Bengal High Court in the case of Raj Kishore Lahoory *v.* Govindra Chandra Lahoory, I. L. R. 1 Cal. 27, there can be no such thing as survivorship in a family governed by the Bengal school of law. The course of succession is always determined by the law of inheritance. In case of reunion there is a special law which will be discussed in the proper place. Reunion restores the status of joint family according to the Dayabhaga. In fact the texts which refer only to reunited coparceners are applied by Jimutavahana to the case of undivided coparceners also.

CHAPTER VIII.

SECTION I.

WHO ARE ENTITLED TO BE MAINTAINED.

Maintenance of dependents, the chief duty of a householder.

1. The chief duty of a householder, according to Hindu Law, is the maintenance of the dependent members of his family. Even sacrifice is regarded as mockery if, thereby, a man deprives himself of the means of maintaining his dependants. Acts which are forbidden in the Shastars, are declared as lawful for him who cannot otherwise maintain those whom he is bound to support. A Brahmin ought not to accept a gift from a Sudra; but, for the maintenance of dependants, such acceptance is held as excusable. Manu says—

* वृद्धौ च मातापितरौ साध्वीभार्य्या सुतः शिशुः ।
अप्यकार्य्यशतं कृत्वा भर्त्तव्या मनुरब्रवीत् ॥

Who are entitled to be maintained according to the Shastars.

2. From the above text and others to be cited, it will appear that the following persons are entitled to maintenance:—

1. Father and mother (including stepmother).
2. Virtuous wife.
3. Infant children.
4. Grown up children who are destitute and dependent.
5. Persons who are excluded from inheritance for any cause other than degradation; their sonless wives and unmarried daughters.

Right of parents to maintenance

The maintenance of aged parents and wife and children is declared as an imperative duty in the Shastars. Manu says that a person who would not support his parents, his wife and his children ought to be punished by the king.

Manu, chap. VIII, *v*. 389.

* A mother and a father in their old age, a virtuous wife and an infant son must be maintained even though by doing a hundred times that which ought not to be done.

3. Among the Hindus sons not only maintain their aged parents, but very often place their whole surplus income at the disposal of the father, so long as he is capable of managing the affairs of the family.

How far legally enforceable.

4. In an old case cited in the Vyavastha Darpan, p. 325, it was held that the duty of maintaining an aged father is legally enforceable. The question, however, is not one of inheritance or succession; and on principle of equity and good conscience which must govern it, a different opinion may be maintained, unless regard is shown to the doctrine of the Hindu Shastars and to the feelings and ideas of the Hindu community. If the son dies in the lifetime of the father leaving self-acquired property, then his heir, it seems would be bound to maintain the father. For then the question would be one of inheritance, and would be governed by Hindu law. The moral obligation of the deceased son must amount to a legal obligation when his property goes to his heir.

5. The right of the mother to maintenance stands on the same footing as that of the father, when the son is not in possession of any paternal property But where sons succeed to the paternal estate either by survivorship or by inheritance, then the duty of maintaining the wives of the father becomes imperative. (Mandadani Devi *v.* Joy Narain Pakrasi; Kaushila Devi *v* Joy Narain Pakrasi cited in the Vyavastha Darpana, p. 334.) In the first case the plaintiff was the stepmother of the defendant; and in the second case the plaintiff was his mother. Maintenance was decreed in both the cases out of the estate which the defendant inherited from his father.

6. If partition takes place between the sons, after the father's death, then according to the Dayabhaga (chap. III, Sec. II, para. 29) and the Mitakshara (chap. I, Sec. VII, para. 2), and according to the decisions of the Bengal and Allahabad High Courts, the mother is entitled to a share. (Jadu Nath *v.* Bishnu Nath, 9 W. R. 61; Bilaso *v.* Dina Nath, I. L. R 3 All p 88.) But the mother cannot demand partition. And where there is only one son, she cannot possibly have anything besides maintenance. In Madras, and possibly also in Bombay, the mother cannot claim a share on partition. She can only have maintenance. (Smriti Chandrika, chap. IV, 4-7; Minatchee *v.* Chetum, Mad. Dec. of 1853.)

y remar-
ge mother
y forfeit
right to
intenance.

7. If the mother or stepmother remarries, then under Sec. II of the Widow Marriage Act, she forfeits her right to maintenance from the date of remarriage.

unchas-
y also.

8. A claim by a stepmother for an allowance from her deceased husband's estate was dismissed on proof of such impropriety of conduct on her part, as in the opinion of the Court, deprived her of legal claim to maintenance according to Hindu law. (Rani Basanta Kumari *v.* Rani Kamul Kumari, S. D. A Reports, Vol. VII, p. 144) The father's widow cannot claim to be maintained by the son if she lives such a life that she could have been lawfully deserted by her husband, if living.

ut not by
ply living
art.

9. It is ordained* that the husband's relatives are the natural guardians of a widow. But it is now settled by the decision of the highest tribunal that "all that is required of her is, that she is not leave her husband's house for improper or unchaste purposes, and she is entitled to retain her maintenance, unless she is guilty of unchastity or other disreputable practices after she leaves that residence." Prithi Sing *v* Rani Raj Koer, 12 B. L. R. 238; Jadu Moni Dasi *v.* Kshettra Mohun Sil cited in Vyavastha Darpan, p. 335; Kustura Bai *v.* Sivaja Ram, I. L. R. 3 Bom. p. 372.

10. The right to choose a separate residence and a money maintenance does not rest absolutely with the widow for her own pleasure. Unless there are special circumstances which make it more prudent or decorous that the widow should live apart, she must submit to the control of her son or stepson or father-in-law or brother-in-law who may happen to be the nearest male relative of her deceased husband. (Ranga Vinayak *v.* Yamuna Bai, I. L. R. 3 Bomb. p. 44.)

11. The circumstances which would justify a widow to live in the home of her parents would appear from the following remarks, in the judgment of the Privy Council, on the authority of which the case of Jadu Moni *v.*

---

* मृते भर्त्तर्य्यपुत्रायाः पतिपक्षः प्रभुः स्त्रियाः ।
विनियोगार्थरक्षासु भरणे च स ईश्वरः ॥
परिक्षीणे पतिकुले निर्मनुष्ये निराश्रये ।
तत् सपिण्डेषु चासत्सु पितृपक्षः प्रभुः स्मृतः ॥

Dayabhaga, chap XI, Sec I, para. 64.

Kshetra Mohun Sil was decided. Their Lordships observed: "It was not pretended that she had withdrawn herself for unchaste purposes. She was only fourteen years old at the death of her husband: his brothers were young men: and she thought it more prudent and decorous to retire from their protection, and live with her mother and her family after the husband's death. Therefore, it appears quite clear from the answers given by the Pandits, that she did not forfeit the right of succession to the husband's estate, on account of removing from the brothers of her late husband."

12. If the husband choose by will to make it a condition that his widow should reside in the family house, such a direction has been held to be binding, and the continuance of her maintenance would depend upon her obedience. (Bama Sunderi *v.* Padma Moni, S. D. of 1859, p. 457; Kunja Mony Dasi *v.* Gopi Mohun cited in Vyavastha Darpan, page 389.)

The right of sons to maintenance

13. The right of infant sons to maintenance is expressly recognized in the texts of holy sages quoted before. According to the Mitakshara theory, sons acquire by birth a right to the paternal wealth. And if there be ancestral property, then the son is not only entitled to maintenance, but can claim a share of that property against the will of the father.

14. If the father has no other property than what is acquired by him, still the son can claim partition, under certain circumstances; and it has been held in some cases that the father cannot make such a disposition of his self-acquired property as to leave his sons or any of them altogether destitute. (Muttumara *v.* Lakshmi, Mad. Dec. of 1860, 227; Komola *v.* Gunga Dhera, Mad. Dec. of 1862, 41; Madhusook *v.* Budree, 1 N. W. P. H. C 153). Though the opposite has been laid down in the cases cited below,* there can be no doubt that a son is entitled to maintenance under all circumstances.

15 Where the father has neither ancestral nor self-acquired property, there the liability of the father to maintain his children, is not a question of inheritance, succession or marriage, and cannot be determined according to Hindu law.

* Mudun Gopal *v* Ram Baksh, 6 W R 71, Ajudya *v* Ram Saran, *ib*, 77; Raja Ram *v* Lutchmun Pershad, 8 W R 15, Sadanund *v.* Soorju Monee, 11 W. R 486, Ganga Bai *v* Vamaji 2 Bom. H. C. 318; Sital *v.* Mahdo, I. L. R. 1 All. 394.

16 The liability of the father to maintain his infant children cannot admit of any doubt on principles of equity and good conscience. As to the question—how long does that liability continue? the answer would also be, on the same principle, that the father is liable to maintain his children, legitimate or illegitimate, so long as they are minors, and are presumably incapable of earning their livelihood. The liability would continue, it seems, even after the son has arrived at the age of majority, in case he labours under a permanent incapacity. A temporary incapacity would certainly entail no such duty on the father. (Prem Chand *v.* Hoolas Chand, 4 B. L R. App. 23.)

Liability of the father to maintain his daughters ceases after they are given in marriage.

17 The liability of the father to maintain his female children ceases from the time when they are given in marriage to a suitable bridegroom. (Ramın *v.* Condumul, Mad. Dec. of 1858.) If the father deliberately gives his minor daughter to a pauper, as the Koolins of Bengal sometimes do, then I conceive, he cannot derive any advantage from his own wrong, and refuse to maintain the girl.

Right of an adopted son to maintenance.

18. There is no express decision as to whether an adopted son can claim maintenance after attaining majority. If the family is governed by the Mitakshara law, then the adopted son takes a vested interest in the family property; and would be entitled to be maintained out of it so long as the family remains undivided. But in a family governed by the Dayabhaga, an Aurasa son cannot claim maintenance as a matter of right, after attaining majority; and an adopted son cannot be in a better position. Mr. Macnaghten is of opinion that an adopted son in Bengal has power to prohibit the sale of ancestral property by the father. I do not find any authority for the proposition, unless it be held that there is an implied contract.

19. If after adoption, it appears that it is invalid for some reason or other, then the boy is entitled to maintenance. If a boy of a different caste is adopted, then he is entitled to maintenance only.

The son of a slave girl.

20. According to the Mitakshara, the son of a Dasi by a twice-born man is entitled to maintenance, if he be docile (Mit. chap. I, Sec XII, para. 3). It is not necessary that the boy should be born in the house of his father; or that his mother should have a recognized

status in it. (Muttaswamy *v.* Vencutashwara, 12 M. I. A. p. 203; Chuoturya Run Murdun Sye *v.* Sahib Perlad Sye, 7 M. I. A. 18.) In the latter case, the putative father was a Kshattri and the mother was a Sudra.

The child of adulterous intercourse.

21. The child begotten of adulterous intercourse can have no right of inheritance even among Sudras; but is entitled to maintenance (Rahi *v.* Govind, I. L. R. 1 Bom. p. 97; Viraramuthi *v.* Singaravelu, I. L. R. 1. Mad 306).

Dayabhag law with regard to illegitimate sons.

22. With regard to an illegitimate son begotten by a Brahmin on a concubine of the Sudra caste, Jimutavahana quotes the following text of Vrihaspati and Manu.

अनपत्यस्य शुश्रुषु र्गुणवान् शूद्रयोनिजः ।
लभेताजीवनं शेषं सपिण्डाः समवाप्नुयुः ॥
Vrihaspati cited in Dayabhaga, chap. IX, para. 28.

यं ब्राह्मणस्तु शूद्रायां कामादुत्पादयेत् सुतं ।
स पारयन्नेव शवस्तस्मात् पारशवः स्मृतः ॥
Manu, chap. IX, 178.

On the authority of these texts, Jimuta says that to the illegitimate son of a Brahmin by a Sudra woman, "something should be given to enable him to practice agriculture or some other profession adapted to earn a subsistence; but to one deficient in good qualities, food and other necessaries are to be given, in consideration of his behaving with humility and obedience." (Dayabhaga, chap IX, para. 28.)

23. It has been held that, according to the Bengal school of law, an illegitimate son, begotten by a Kshatrya on a Sudra woman, is not entitled to maintenance after attaining majority. (Raja Nilmony Sing *v.* Baneshwar, I. L. R 4 Cal. 91.)

24. The illegitimate son of a Brahmin cannot, it is obvious, be in a better position.

25. Considering what is stated in para. 28, chap. IX of the Dayabhaga, it seems that the illegitimate sons of Brahmins and Kshatryas by Sudra women are morally entitled to maintenance, even after attaining majority. If that be so, then after the death of the father, they may legally claim maintenance out of his estate. But there is no decision on the point, so far as I am aware.

26. The abandoning of a child under 12 years, whether

legitimate or illegitimate, is punishable under sec. 317 of the Indian Penal Code.

ummary
ocedure
recovery
mainte-
nce.

27. By the Criminal Procedure Code (Act X of 1882), it is provided that "if any person having sufficient means, neglects or refuses to maintain his wife or his legitimate or illegitimate child, unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate, or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate not exceeding fifty rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs" Sec 488, Act X of 1882.

28. A child, legitimate or illegitimate, who is unable to maintain itself is entitled to maintenance from the father under this section. The word child obviously means a minor.

29. It does not appear clear whether a female child who is given in marriage can claim her maintenance from her husband alone, or from her father also.

The right of
ife to main-
nance.

30. The maintenance of a wife by her husband is a matter of personal obligation arising from the existence of the relation, and independent of the possession of any property. The Sanskrit word भर्ता (husband) literally means supporter. The obligation attaches from the moment of marriage. Where the wife is immature, it is the custom that she should reside with her parents. But they maintain her, at the time, as a matter of affection. If from inability, unwillingness or any other cause, the parents choose to demand her maintenance from her husband, he is bound to pay it (Ramian *v.* Condumal, Mad. Dec. of 1858.)

The wife
ust live in
er hus-
and's house.

31. A wife cannot effectively release her husband and his heirs from her right to subsistence by a deed. (Laksman Ram Chandra *v.* Satiya Bhama, I. L. R. 2 Bomb. 494; Narbada Bai *v.* Mohadeo Narain, I. L. R. 5 Bomb. 99.) The wife is bound to remain in her husband's house from the time of her attaining puberty, and the husband is bound to maintain her, while she is willing to reside with him, and to perform her duties. If she quits him of her own accord, either without cause, or on account of such ordinary quarrels as are incidental to

married life, she can set up no claim to a separate maintenance. (Kalyaneshwara *v.* Dwarka Nath Sarma, 6 W. R. 116; Sidlingapa *v* Sidupa, I. L. R. 2 Bomb p. 634.)

32. Nothing can justify a wife in leaving her home, except such violence as renders it unsafe for her to continue there, or such continual ill-usage as would be termed cruelty in an English Matrimonial Court, 5 I. L. R. 500.

In case of cruelty wife may live apart.

33. The wives of the junior members in a Hindu family are sometimes treated with cruelty by the mother and sisters of their husbands. If the cruelty be such as to endanger the life or health of the wife, then it seems, that the wife would be entitled to demand separate house and maintenance.

34. If a man openly keep a concubine, and treats his wife with disrespect then, according to the prevailing opinion in the Hindu community, at least in Bengal, the wife ought to be allowed to live separate, and to have a separate maintenance. No doubt, there are texts which inculcate obedience to the husband as the primary duty of a wife. But where the conduct of the husband is such, that by compelling the wife to live with him, her life is made miserable for ever, there it would be the height of cruelty, if the Courts of law would not allow her to live separately and to have a separate allowance. A wife who is superseded by her husband taking a second wife is declared entitled to one-third of the husband's property. And it would certainly be consistent with our Shasters to hold that a wife who is superseded by a concubine ought to have separate allowance Moola *v.* Nandy, 4 N. W. P. 109.

35. Where a Hindu husband kept a Mahomedan mistress, the Court considered that this was such conduct as rendered it impossible for the wife to live with him. (Lala Govinda *v.* Dawlut, 14 W. R. 451) By having intercourse with a Mahomedan, a Hindu becomes degraded; and the wife is not under any obligation to live with a degraded husband. For the law is—

The wife is not bound to live with a degraded husband.

पतितस्त्वपतितं भजेत्

For the same reason a wife cannot be compelled to live with a husband who becomes a convert to Christianity or Mahomedanism.

36. A wife cannot leave her husband's house, or demand separate allowance, on the husband taking a second wife (Veraswamy *v.* Appaswamy, 1 Mad. H. C. 375).

The effect of adultery on the right of the wife's maintenance.

37. A wife who leaves her husband's house for purposes of adultery cannot claim to be taken back, or to be maintained. (Ilata Savitri *v.* Narayan 1 Mad. H. C. 372.)

38. An unchaste wife may be forsaken, if she becomes pregnant by the adulterous intercourse, or if she would not perform penance which involves a solemn promise to abandon the course of vice. Manu says—

स्वच्छन्दगा हि या नारी तस्यास्त्यागो विधीयते ।
न चैव स्त्रीवधः कार्य्यो न चैवाङ्गविकर्त्तनं ॥

[An unchaste wife may be forsaken; but she is not to be killed or mutilated.]

But Yajnyavalkya says—

व्यभिचारे ऋतौ शुद्धि गर्भे त्यागो विधीयते ।

[An adulterous wife may become pure (by expiation) after the subsequent courses. But if she becomes pregnant (by adulterous intercourse) she may be forsaken]

39. According to Vijyaneshwar "forsaking" means ceasing to have any intercourse. According to the great commentator, the text does not authorize the husband to turn the adulterous wife out of doors. (Mit. I, 82.) The adulterous wife is to be deprived of her honours, to be meanly dressed, and made to live upon such food as is just sufficient to sustain life. Yajnavalkya 1, 80.

40. An unchaste wife may be turned out of doors, if she would not perform penance, nor abandon her course of vice. (Viramitrodaya, chap. III, part I, Sec. X, p 153, G. C. Sastri's edition.)

41. An unchaste widow of a deceased coparcener may be deprived of her maintenance (and turned out of doors) by reason of the text of Narada cited in Dayabhaga, chap. XI, Sec. 6, para. 18 Maharani Basanta Kumari *v.* Maharani Kamal Kumari, 2 S. D. 168. The unchaste widow cannot claim even a starving maintenance. (Viramitrodaya, chap. III, part I, Sec. 10.)

42. The husband is bound to give a starving maintenance to the faithless wife who would perform penance. See *Ib.* It may not be out of place to state here that penance involves a solemn promise not to repeat the wrong act.

43. Where a decree had been given awarding a bare maintenance to a woman, it has been held that she does

not forfeit her right to that by subsequent unchastity. 1 Honama v. Timamma, I. L. R 1 Bom. 561.

44. Where a wife leaves her husband's house, with his consent, he is bound to receive her again (Nityi Laha v. Sundari Dasi, 9 W. R. 275.)

The power of a Hindu wife to pledge her husband's right.

45. A Hindu wife acquires by marriage a qualified ownership in the estate of her husband If she is unlawfully refused her maintenance, she has it seems the right to pledge her husband's credit as in England. The qualified ownership being acquired by marriage, it ought to be capable of being exercised when absolutely necessary.

The right of a widow to claim maintenance from her husband's father or brother.

Mitakshara Law

46. When a member of a family governed by the Mitakshara, dies, his right to the family property is extinguished; and the surviving members become entitled to the whole interest. But the widows of deceased members are entitled to claim maintenance from the surviving coparceners. The widow of a deceased son is entitled to claim maintenance from her father-in-law, if there be any property in which the son was jointly interested with the father in his lifetime. (Hem Kooari v. Ajodhya Pershad, 24 W. R. 474)

Bengal Law.

47. In Bengal, the widow takes the share of her husband, if there be no male issue. If there be male issue, she is entitled to maintenance from them.

Kshetra Mani v. Kashinath Das.

48. If the husband dies without leaving any property, then the question arises, whether she can demand maintenance from her husband's father, brother, &c. The question arose in the case of Kshetra Mani Dasi v. Kashinath Das (2 B. L. R 15). In that case the plaintiff was the widow of the defendant's son There was no joint family property, and the son left no property of his own. The only property possessed by the father-in-law was a monthly pension. After her husband's death, the widow went to reside in her own father's house. The suit was brought by her to have a fixed money-payment made to her. It was admitted that the defendant was willing to support her in his own house, and there was no evidence to show that she had been driven from his house by any ill-treatment. It was held by a Full Bench that her claim could not be supported.

49. Thecase of Kshetra Moni v. Kasinath has left undecided what the result would be, if there is ancestral property in the hands of the father. If the father has such property, then there can be no doubt that he is morally

bound to give maintenance to his grown up sons, and probably also to their wives. (Dayabhaga, chap. I, para. 45.) After the father's death, his heirs would, therefore, it seems be legally bound to give maintenance to the widow of his predeceased son.

50 Under the Mitakshara law, it is settled now that the liability of the sons to pay the debts of the father extends over all the ancestral property in the hands of the sons, and is not limited to the share possessed by the father in the same, at the time of his death. The principle seems to be, that a moral obligation, combined with the possession of ancestral property creates a legal liability. On the same principle, it may be contended that a father in Bengal is legally bound to give maintenance to his grown up sons and their wives, if the father has ancestral property in his hands. There is no decision on the point; it is, therefore, difficult to say what the law is with reference to it.

51. Hindu fathers, who have any property, do generally give maintenance to the widows of their sons either, *suo motu*, or in order to avoid public odium An authoritative ruling on the point, in favour of the son's widow would be not only in accordance with the Shastars, but it would accord with the current of public opinion, in the Hindu community It seems hardly reasonable that the son's widow should not have maintenance even where the property is inherited by a collateral.

The Bombay decisions on the point

52. In Bombay it used to be held formerly that when the widow of a near member of the family is actually destitute, she has a legal right to be maintained by the other members, even though they were separated from her husband, and possessed no assets upon which he or she ever had any claim. (Bai Lukmee *v.* Lukmundas, 1 Bom H. C. 13; Mdaram *v* Sonkabai, 10 Bomb. 384) These cases were examined and overruled in a later decision, in which a widow, who was living apart from her husband's family, sued his paternal uncle, for a money-allowance as maintenance. The Court held, that the suit must fail for two reasons: first, that the defendant was separated in estate from the plaintiff's husband at the time of his death; and secondly, that at the institution of the suit there was not in the possession, or subject to the disposition of the defendant any ancestral estate of the plaintiff's husband or of his father. Savitra *v.* Laxmi, I. L R. 2 Bom. 573.

53. If the husband is excluded from inheriting the paternal wealth, then the wife or widow of such excluded coparcener obtains maintenance from those who take his share of the paternal wealth.

The wife of a person excluded from inheritance is entitled to maintenance

54. It has been already stated that persons excluded from inheritance, are entitled to maintenance, unless the exclusion be on account of being degraded, or on account of being the son of a degraded person. Even if degraded persons be entitled to share on partition, now under Act XXI of 1850, yet their sons cannot be entitled to share or to maintenance.

55 A female heiress is exactly under the same obligation to maintain dependent members of the family as a male heir; and the obligation even extends to the king, when he takes the estate of any person by escheat or forfeiture (Narada, XIII, 52; Mussamat Golab Kumari v. Collector of Benares, 4 M. I. A. 246 If the ancestral estate is an impartible Raj, then the person who succeeds to the Raj is held legally bound to give maintenance to all who but for the impartibility of the Raj, would have been co-sharers. (Himmat Sing v. Ganpat Sing, 12 Bomb. H C 94; Ram Chandra v. Sakharam, I. L. R. 2 Bomb. 346.)

Whoever takes the estate as heir is bound to give maintenance to the dependants of the last owner.

SECTION II.

AMOUNT OF MAINTENANCE.

1. No exact rule can be laid down as to the amount which ought to be awarded as maintenance in any case In every instance the first question would be, what would be the fair wants of a person in the position and rank of life of the claimant? The wealth of the family is a proper element in determining this question. But the amount of maintenance does not vary with the extent of the family property, for, if it be held that the amount of maintenance must be in proportion to the family property then, as observed by the Privy Council "a son not provided for, might compel a frugal father, who had acquired large means by his own exertions, to allow a larger maintenance than he himself was satisfied to live upon; and than children as part of his family must be content with." (Tagore v. Tagore, 9 B. L. R) As regards the widow of a deceased coparcener in a Mitakshara family,

Matters which must be taken into consideration in determining the amount of maintenance

it has been held by the Bombay High Court, that she is not entitled to a larger portion of the annual proceeds of the family property than of the share to which her husband would have been entitled on partition, (Madhav Row *v.* Ganga Bai, I. L R 2 Bom. 639.)

2. In calculating the amount of maintenance to be awarded to a female, her own Stridhan, given by the family bound to maintain her, should be taken into consideration, unless it consists of clothes and jewels only, and is of an unproductive character (Shiv Daya *v.* Doorga Pershad, 4 N. W. P. 63 ; Chandra Bhaga Bai *v* Kasi Nath, 2 Bom 341)

The rate of maintenance decreed may be reduced if the family property is reduced.

3. An allowance fixed, in reference to a particular state of the family property, may be diminished by order of the Court, if the assets are afterwards reduced (Ruka Bai *v.* Ganda Bai, I L. R 1 All. 594.)

Property allotted for maintenance

4. As a general rule property allotted for maintenance is resumable at the death of the grantee (Woodayaditya *v.* Makuna, 22 W. R. 225 ; Uday *v.* Jadub, I. L R. 5 Cal. 113.) Ananda Lal Sing *v.* Moharaja Gurrood Narayan, 5 M. I. A 82.

Successive enjoyment for three generations without interference of land granted by a zemindar to a member of his family in lieu of maintenance justifies the presumption that the original grant was intended to be absolute. 1 Sri Raja Jaganadha *v* Sri Rajah Peda, I. L. R. 4 Mad. 371.

SECTION III

CLAIM TO MAINTENANCE—HOW FAR A CHARGE ON THE ESTATE.

Claim to maintenance not a charge on the estate in the hands of a bona fide purchaser.

1. There are several texts which prohibit the gift of property to such an extent as to deprive the donor's family of the means of subsistence. But none of these texts declares that the right to maintenance is an actual charge on the estate of the person bound to give it. It is true that females acquire by marriage a sort of *quasi* ownership in the property of their husbands. But it is open to question whether that *quasi* ownership is such as to prevent the husband or his sons from being able to sell the whole property. However that be, it is now

settled that "the lien of a Hindu widow for maintenance; out of the estate of her deceased husband is not a charge on the estate in the hands of a *bonâ fide* purchaser." (Maharani Adhirani Narain Kumari *v.* Sonamuli Pat Day, I. L. R. 1 Cal. p. 365). Sham Lal *v.* Bannu, I. L. R. 4 All. p. 296.

Even thou the purcha ser had notice.

2. It has been also held that the mere circumstance that such purchasers had notice of her claim is not conclusive of the widow's right against the property in their hands. (Laksman Ram Chundra *v.* Satya Bhama, I. L. R. 2 Bomb p 494.)

3. If the property is sold by her son or stepson to pay the debts of her husband or his father, or for the benefit of the family, or to satisfy a decree for maintenance, the widow cannot object to the sale. For, under the circumstances, a son cannot dispute the validity of the transaction; and the widow cannot be in a better position than a son.

Debts pay able by deceased person take precedence over claims to maintenance on his estate.

4. The debts payable by a deceased owner take precedence of the maintenance of his widow. According to the letter of the texts, sons can divide among themselves only that portion of the paternal estate which remains after payment of ancestral debts. If a partition takes place among the sons, then the mother takes a share equal to that of her sons. The extent of her right being thus at the utmost equal to that of a son, it must be obvious that she cannot object to the sale of her deceased husband's estate for payment of his debts.

Under what circumstances the persons entitled to maintenance may object to the sale of the family property.

5. If the deceased owner was a member of a joint family governed by the Mitakshara, and if he has no male issue then his surviving coparceners are not liable to pay his personal debts. They are bound to give maintenance to the widow of the deceased. But if they sell the family property or any portion of it in order to pay the debts of the father or grandfather of the deceased, or if they sell the family property for the benefit of the undivided family then the widow of the deceased coparcener cannot object, to such sale, because if her husband lived, even he could not do so.

6. If the sons or surviving coparceners of the deceased owner sell the family estate under any other circumstances, the widows of deceased coparceners have a right to object. But if there is an ample estate left, out of which to provide for the widow, or if knowing of a proposed sale, she does not take any step to secure her own interest, then no imputation of bad faith or of abetting it

can be made against the purchasers of a portion of the family property.

7. If the estate is small and insufficient or if being large the greater portion of it is about to be sold, then it is the vendee's duty to enquire into the reason for sale, and not by a clandestine transaction to prevent the widow from asserting her right against the vendor and the property about to be sold. The vendee, who purchases the greater portion of the family estate, cannot as against a claim for maintenance, plead that he is a *bonâ fide* purchaser for value without notice.

8. The widows of the father and of deceased coparceners* are entitled to maintenance from the heir or the survivor in whom the estate of the deceased vests. But there is no text which makes the purchaser from the son or survivor liable to give maintenance to the widows of the last owner. If the vendor has no other property to meet the claim, and if the purchaser had notice of the claim, actual or constructive, then the purchaser is held liable on the ground of his being a party to a fraudulent transaction. But if the transaction is a *bonâ fide* one, at the time when it takes place, it cannot afterwards be disputed on account of a subsequent change in the circumstances of the family.

9. In the case of Maharani Narayan Kumari *v.* Sonamalee, (I. L. R. 1 Cal. p. 365) almost the whole family property was sold in execution of a decree for debts, the greater portion of which was either ancestral, or for necessary purposes. But the purchaser was held not liable to give maintenance to the widow of the predecessor of the judgment-debtor. It was held in that case that the purchaser had no notice of the claim; and that at all events there were the surplus sale proceeds which the widow could have made liable to meet her claim. The sale having been for ancestral debts, it was a *bonâ fide* transaction. So that, even if the purchaser had notice still it seems she would not have been liable to meet the claim of the plaintiff.

---

* भ्रातृणामप्रजः प्रेयात् कश्चिच्चेत् प्रव्रजेद्यदि ।
विभजेरन् धनं तस्य शेषास्ते स्त्रीधनं विना ॥
भरणञ्चास्य कुर्व्वीरन् स्त्रीणामाजीवितक्षयात् ।
रक्षन्ति शय्यां भर्त्तुश्चेदाच्छिन्द्युरितरासु तु ॥

Dayabhaga, chap. XI, sec. I, para. 48.

10. Unless the claim for maintenance is made, a charge on the estate by the decree of a competent Court or by a deed, the only ground on which a purchaser can be made liable is his partaking in a fraudulent transaction, *i. e.*, a sale by the vendor without any justifying cause, under circumstances which clearly shew that such sale would prejudice the rights of those who are entitled to maintenance. What the effect of a notice would have been, was not decided in the case. But this much is taken for granted in the judgment that under the circumstances the purchaser was not bound to inquire whether any claim for maintenance was chargeable on the estate.

The ground on which a purchaser of the family estate can be compelled to give maintenance.

11. In the case of Laksman Ram Chandra *v.* Satya Bhama, (I. L R. 2 Bom. 494) the suit was brought by a Hindu widow against her husband's brother and against purchasers from him of certain ancestral immoveable property. The first Court dismissed the suit as against the purchasers. But the Lower Appellate Court decreed her claim against them. On appeal to the High Court it was found that the purchaser admitted notice. But it was held that if the property was sold for debts payable by the husband, such sale would be valid against the widow's claim for maintenance.

Laksman Ram Chandra v Satya Bhama.

12. The law on the subject of widow's claim to maintenance is very fully discussed in the learned judgment of Mr. Justice West in the case cited above; as all the leading cases bearing on the point are discussed in that judgment, it may be usefully referred to.

13 As a general rule, the debts payable by a deceased person take precedence of the maintenance of his widow. But if a charge is created by a deed or by a decree, then such charge must have priority over the claim of an unsecured creditor, or of a creditor whose security is of a subsequent date.

If a charge is created o the family property by the decree c a competent Court then the claim ha priority ove subsequent debts.

14. Persons carrying on a family business, in the profits of which all the members participate, have authority to pledge the family property, especially where such property was originally acquired by means of the profits of that trade. It has been accordingly held that a claim for maintenance cannot prevail against the claim of the creditors of the joint family business. (Ram Lal Thakursidas *v.* Lakman Chand, 1 Bom. H. C. 57; Johura Bibee *v.* Sri Gopal Misser, I. L. R. 1 Cal. p. 470)

Persons carrying on business fo the benefit the family have the right to pledge the family property.

Liability of donee and devisee to give maintenance in case of the gift of the whole estate.

15. It has been held that a gift or devise of the whole or greater portion of a man's estate must always be subject to the claim for maintenance which was enforceable against the donor or testator. Where a husband in his lifetime made a gift of his entire estate leaving his widow without the means of living, it has been held that the donee took the estate subject to her claim to maintenance (Jamuna *v.* Machhul Shaha, I. L. R. 2 All. p. 315; Narbada Bai *v.* Mahadev Narain, I. L. R. 5 Bom. p. 99.)

16. There are cases also in which the devisee has been made liable to give maintenance to the testator's widows (Comulmoni *v.* Ram Nath, Fulton, 189). Mr. Mayne says that the result would be the same, even though the testator expressly and by name declared that the widow should not receive maintenance. I am also of the same opinion; but on somewhat different grounds. "The right of a widow" says Mr. Mayne "to be maintained arises by marriage. It is a legal obligation attaching upon him personally and on his property. He cannot free himself from it during his lifetime; and it attaches upon the inheritance immediately after his death. It seems therefore contrary to principle to hold that by devising the property to another, he could authorize the other to hold it free from claims which neither he himself nor his heir could have resisted."

17. To me it seems that the obligation is a personal one. There is nothing in the texts or commentaries which makes it a charge on the property, unless the qualified right which a female acquires by marriage, in the property of her husband, be held as equivalent to a charge. Then again, it is said that a testator cannot authorize a devisee to do that which he or his heirs could not have done. The testator being required by express texts to maintain his wife, he cannot refuse to do so. His son being also required by express texts to maintain his mother, cannot refuse to do so. Surviving coparceners are also required by express texts to give maintenance to the widows of coparceners who die without leaving male issue. But there is no text which makes a donee or devisee liable to give maintenance to those whom the testator or donor was liable to maintain.

18. In dealing with the law relating to wills, it has been already stated that, according to the principles

accepted by Hindu Jurists, ownership is extinguished by death; and that the will of a Hindu must be wholly inoperative, except so far as it is sanctioned by usage, at the present day. The maintenance of wives and unmarried daughters being a sacred duty, no testamentary disposition can be validly made by which the testator seeks to avoid that duty. This is the ground on which the devisee of the entire estate can be made liable to give maintenance to the dependants of the testator. The Hindu Wills Act now expressly provides that nothing therein contained "shall authorize a testator to deprive any persons of any right of maintenance of which, but for section 2 of the Act, he could not deprive them by will." Act XXI of 1870, sec. 3.

SECTION IV.

PROCEDURE FOR RECOVERY OF MAINTENANCE.

Suits for maintenance 1. Suits to establish a right to maintenance can be brought within 12 years from the time when the right is denied. Act XV of 1877, Sched. 2, Art. 129.

Limitation 2. Suits for arrears of maintenance can be brought within 12 years from the time when the arrears are payable Act XV of 1877, Sched. 2, Art. 128.

Jurisdiction. 3. Suits to establish a right to maintenance are not cognizable by Small Cause Courts. (Bhagwan Chandra Basu *v.* Bindu Basinee, 6 W. R. 286.)

4. Suits for arrears of fixed maintenance have been held to be cognizable by Courts of Small Causes, (Ram Chandra Dikshit *v.* Savitra Bai, 4 Bom. 73). The decree, in such a case, may provide for future maintenance which may be recovered by process of execution. (Sinthayu *v.* Thana Kapadaya, 4 Mad. 183.)

Valuation 5. Suits for arrears of maintenance must be valued according to the amount claimed. (Clause I, sec. 7, Act VII of 1870.)

6. Suits for establishing right to maintenance or suits in which future maintenance is claimed, must be valued at ten times the amount claimed to be payble for one year. (Clause II, sec. 7, Act VII of 1870.)

Frame of the suit. 7. If a female sues her husband or her husband's heirs for separate money allowance, the grounds on which she

is entitled to separate maintenance must be set forth in the plaint. And the facts constituting those grounds must be proved by the plaintiff. (Prithee Sing *v.* Rani Raj Koer, 12 B. L. R. 238; Ranga Vinayek *v.* Yamunabai, I. L. R. 3 Bomb. p. 44.)

8. If the suit is against a purchaser from the husband's heirs, the grounds on which the purchaser is sought to be made liable must be stated in the plaint. If the charge was created, before sale of the property, by the decree of a Court or by a deed, then the property would be subject to such charge in the hands of the purchaser. If no such charge was created then the purchaser can be made liable only by showing that he, at the time of his purchase, knew or ought to have known that the sale was not on account of ancestral or trading debts or family necessity; and that the effect of the sale would be to deprive the dependent members of the family of their means of subsistence.

9. If the suit be for making the claim to maintenance a charge on a specific portion of the family property, then the plaintiff must allege and prove that the party in possession of the same is committing waste; and that, unless the property be declared subject to the charge, the interest of the plaintiff would be jeopardized.

Objection to the sale of property charged with maintenance.

10. If the property which is answerable for maintenance is attached in execution of a decree for the personal debts of the judgment-debtor, then the Court, on objection being made, may, it seems, declare the property to be subject to the lien.

Arrears of maintenance.

11. Arrears of maintenance used to be refused by the Madras Sudder Court. But it is now settled that arrears may be awarded at least from the date of demand. (Venkopadhyaya *v.* Kaveri Hengusa, 2 Mad. H. C. 36; Prithv Sing *v.* Rani Raj Koer, 2 N. W. P. 170; Jadu Mani *v* Kshetra Mohun, V. D. 382; Rango Vinayak *v.* Yamuna Bai, I. L. R. 3 Bomb. 44.)

12. A second suit for maintenance is not barred as *res judicata*, if the first suit was for an earlier period (Laksman Ram Chandra *v.* Satyabhama, I. L. R. 2 Bomb 497.)

Summary Jurisdiction of Criminal Courts.

13. The maintenance of wives and children is recoverable summarily under sec. 488 of the Criminal Procedure Code.

CHAPTER IX.

LAW OF INHERITANCE ACCORDING TO THE MITAKSHARA.

Section I.

GENERAL REMARKS—RIGHT OF WIDOW.

The law inheritanc applies or to the esta of a pers who was a membe a joint fan at the tim his death.

1. The law of Inheritance, according to the Mitakshara, applies only where a man dies separate. If a man dies as a member of a joint family, his interest in the joint family property is extinguished by his death. And the surviving members, whoever they be, whether sons, brothers or nephews, continue in possession of the whole property as sole owners, as if the deceased member never existed. Sons acquire an interest by birth in the paternal property; and, unless the father effects a partition in his lifetime, and separates himself from them altogether, they take by survivorship and not by inheritance.

The cou of inheritance.

2. When a man dies leaving any property of which he was the sole and absolute owner in his lifetime, the law of inheritance regulates the course of succession to such property. If he leaves male issue separated from him in his lifetime, the property goes to them. The widow and the rest succeed only in default of male issue. If there be no after-born son, but only separated sons, grandsons or great-grandsons of the deceased, they take his property, as if he lived jointly with them, at the time of his death. Their respective shares *inter se* are determined by the law relating to partition. (Mitakshara, chap. I, sec. VI, para. 16.)

The te Jajnyava kya on tl subject.

3. The course of inheritance to the estate of a sonless man is regulated by the following text of Jajnyavalkya, and by similar texts in the other Smritis:—

पत्नी दुहितरश्चैव पितरौ भ्रातरस्तथा ।
तत्सुतो गोत्रजो बन्धुः शिष्यः सब्रह्मचारिणः ॥
एषामभावे पूर्व्वस्य धनभागुत्तरोत्तरः ।
स्वर्यातस्य ह्यपुत्रस्य सर्व्ववर्णेष्वयं विधिः ॥

Mit. chap. II, sec. I.

According to the interpretation put upon this and other texts on the same subject by the author of the Mitakshara, the order of succession laid down by him is as follows :—

Order of heirship according to the Mitakshara.

1. Widow.
2. Unmarried daughter.
3. Married daughter who is sonless and indigent.
4. Married daughter who has son and is rich.
5. Daughter's son.
6. Mother.
7. Father.
8. Brothers of the whole blood.
9. Brothers of the half blood.
10. Nephews.
11. Grandmother
12. Grandfather.
13. Uncle.
14. Uncle's son.
15. Paternal great-grandmother.
16. Paternal great-grandfather.
17. His sons.
18. His grandsons.
19. Other sapindas to the seventh degree.
20. Samanodakas.
21. Bandhus.
22. Preceptor.
23. Pupil, Fellow student, &c.

Widow naturally succeeds when her husband dies separate without any male issue.

4. Where a man dies separate, without leaving any male issue, the widow naturally remains in possession of her deceased husband's estate; and in recognizing the widow's right as heiress to her sonless husband, the holy sage recognized in all probability a well-established custom. Some of the sages, however, maintain that the widow is entitled only to maintenance. Vijnaneshwar reconciles the apparent conflict by saying that the texts of the latter are applicable only where the deceased owner was a member of a joint family at the time of his death. Partition and reunion being dealt with by the holy sage separately, the text quoted above in reference to the heirship of widows is held by his commentator to apply to divided property.

The conflicting texts with reference to widow's right reconciled by Vijnaneshwar.

5. The fact is, that so long as property remains joint,

it is difficult for the widow of a deceased coparcener to take her husband's share The property remains in the possession of the surviving coparceners; and the widow cannot take her husband's share, without actual partition by metes and bounds. In the natural course of things, the surviving coparceners remain in possession of the whole; and the idea naturally gains ground that they take the property by survivorship. Like the other members of the family, the widow gets her maintenance; and even if a partition takes place immediately after the death of a coparcener, the widow can hardly claim anything more than maintenance.

Vrihaspati text with reference to the right of widow

6. The text of Vrihaspati, with reference to the widow's right as heir, seems to be in favour of making her entitled to the share of her husband in joint family property. But it is evident from the style of the various arguments* and reasons which the sage has adduced that the right of the widow was not generally recognized in his time.

Bhoja Raja and Srikara views on the subject.

7. To reconcile the various texts with reference to the widow's right is well nigh impossible. The explanations given by the commentators both before and after Vijnaneshwar are far from being satisfactory. Bhoja Raja said that the widow is entitled to a share, if she is appointed to raise issue. Srikara says, that the widow takes the share of her husband, if the property is of small value. But that she is entitled only to maintenance if the property is large.

Their doctrines are unpractical

8. These interpretations are not only unsupported by authority, but are such as cannot be accepted as law, for practical purposes. The law, as laid down by Vijnaneshwar, reconciles the texts more successfully, and at the same time it has that element in it which rendered it acceptable in practice. Vijnaneshwar declared that to be the law which took place in the natural course of things.

Vijnaneshwar's view on the subject has the merit of being practical

* One of the grounds urged by the sage is, that a widow is half of her husband's body, and so long as she lives, no one else can have any right to take the property of her husband With reference to this, Mr Mayne says, "It is obvious that this metaphor has the fault of many other metaphors. It proves too much If the husband still survives, the sons cannot take If the widow is looked upon as continuation of her husband's existence, she ought to take even before male issue" The criticism is capable of an easy answer The son is the father himself born again He, therefore, takes before the widow who is only half of her husband.

The estate taken by a widow

9. Vijnaneshwar has said nothing with regard to the nature of the estate which a widow can have in her deceased husband's estate In the chapter on Stridhan Vijnaneshwar has said that what is acquired by a female by inheritance is stridhan. (Mit. chap. II, sec. 11, para. 2) If the property to which the widow succeeds as heiress to her husband, be *stridhan*, then she must have power of absolute disposition over such property, excepting perhaps, immoveables. Over immoveables given by the husband during his lifetime, the wife has not power of absolute disposition. (Mit. chap. I, sec. I, para 20). There is no authority in the Mitakshara for extending this law to apply to property inherited; and considering what is said by the author as to what constitutes Stridhan, it may well be contended that property inherited by the widow from her husband is alienable by her, whether such property be moveable or immoveable. But it has been held by the Privy Council, in accordance with the opinion of Pundits, that the widow's estate is a limited one, even in families governed by the Benares School. The texts of Katyana and Mahabharat are not explained away in the Mitakshara; and as those texts are binding and authoritative, the followers of the Mitakshara must admit that the right of a widow to her husband's estate is a limited one. (Mussamut Thakoor Dai *v.* Rai Baluk Ram, 11 M. I. A. p. 139; Bhagwan Deen Doobey *v* Myna Bai, *Ib* p. 487.)

Seems to be absolute according to the Mitakshara.

But it has been very properly held by the Privy Council that it is limited.

According to the Vira Mitrodaya the limitation is a mere moral precept not legally binding.

10. According to the Vira Mitrodaya, the restrictions in the texts of Katyana and Mahabharat do not qualify the widow's proprietory right, but are intended only to restrain wasteful expenditure, for such purposes as gifts to players, dancers and the like. Mitra Misra works out his conclusion on the subject by adopting the very argument by which Jimutavahana has established that notwithstanding the texts which prohibit sale by the father of ancestral property, the father can effect the sale and gift of such property. Jimuta says, that the father being absolute owner of ancestral property, so long as he lives, he must necessarily have the power of alienating it, without the consent of his sons. Similarly Mitra Misra says, that the heirship of the widow being admitted, she must have power of absolute disposition, though she incurs sin by such wasteful expenditure as is prohibited by the texts of Katyana and Mahabharat. But it may be said

MitraMisra's reasoning commented on.

that the right of female heirs being based on texts, it may be limited by texts

11 Mitra Misra agrees with Jimuta in holding that after the widow's death, the husband's heirs succeed. But the reasoning adopted by Mitra Misra shews that, according to him, the text of Katyana applies only to the widow and not indefinitely to all female heirs (Vira Mitrodaya, Chap. III, Part I, sec 3)

After the widow's death the husband's heirs succeed according to Mitra Misra.

12. In the last of the two cases cited above, it was laid down that the power of the widow is as limited in respect of moveables as it is in respect of immoveables. But in the Bombay Presidency, it has been held that the widow has absolute power in moveables inherited from her husband. (Bechor Bhagvan *v* Bai Lakshmi, 1 Bomb. H. C. p. 56; Pranjivan Das *v* Dev Kovor Bai, *Ib* 130.)

In the Bombay Presidency the widow is held to have absolute power in moveables.

13. The Shmriti Chandrika which is the leading authority of the Southern School, explains the well-known text of Katyana, on which Jimutavahana bases his restrictions on the widow's estate, as applicable to the case of "undivided wealth which a widow may herself take on account of her subsistence in consequence of her father-in-law and the like not being qualified to maintain her"* and not to the separate property of her husband which she takes by inheritance. But it would be too late now to contend, upon the strength of such interpretation, that the widow's estate under the Madras School is her *stridhan*. The case of *The Collector of Muslipatam v. Cavaly Venkata Narainpa* which is a Madras case would be conclusive against such a contention (See I. L. R., 4 Mad. 375.)

The doctrine of the Shmriti Chandrika

14. The authority of Katyana's text being admitted as binding on all the schools, it follows also that the husband's heirs succeed after the death of the widow even in families governed by the Mitakshara. This was laid down in the case of *Keerut Sing* v *Kolahal Sing*, (2 M. I. A. p. 331) in which case, however, the question of law was not decided upon reference to authorities or texts, but upon the opinion of the Pandit. In the case of Thakoor Dai *v.* Rai Buluk Ram, the text of Katyana was held as binding on the followers of all the schools; and it was decided, upon the authority of that text, that after the widow's death, the husband's heirs succeed even in families

The husband's heirs succeed after the death of the widow

* Shmriti Chandrika, chap XI, sec I, 32, 33

governed by the Mitakshara According to the Bombay High Court also, the succession opens, on the widow's death, to the husband's qualified heirs then in existence. Bhaskar Trimbak *v* Mahadev Ramjee, 6 Bom. H. C 14.

Where there are several widows, they all take equal shares

15. If there be several widows then, according to the Mitakshara, they all take equal shares in the husband's estate The passage in which the law is thus laid down is omitted by Mr. Colebrooke in his translation But it ought to have come between verses 5 and 6 of sec. I of Chapter II of his translation. From the wording of the passage, it would appear that where several widows inherit, they can make a partition, and each may take her own share. It is, however, generally held that the estate which widows and daughters take is a joint one. (Jijoyamba v. Kamakshi, 3 Mad H. C 424; Nilmony *v* Radhamony, I. L. R, Madras 300; Bhagwandan *v* Mayna Bai, 2 P. C. J 327; Katha Permal *v.* Venku Bai, I. L. R. 2 Mad. 194.)

16. So long as widows or daughters remain in the joint estate, their ownership, according to the Mitakshara theory of joint ownership, must be a joint one But it is difficult to see why the widows and daughters should be prevented from making a partition In the case of widows, the result is the same, whether the interest or share of a deceased widow devolves by survivorship or by inheritance. But in the case of daughters, the importance of the distinction is obvious.

17. The effect of unchastity on the widow's right to inherit will be discussed afterwards.

Section II.

DAUGHTER'S RIGHT TO SUCCEED.

Unmarried daughters succeed first

1. According to Jagnyavalkya's text, daughters succeed in default of the widow. Jagnyavalkya makes no distinction between married or unmarried daughters; nor between those that are provided and those unprovided. But Vijñaneshwar quotes the following text of Katyana; and lays down, in accordance with it, that the unmarried daughter succeeds first:—

पत्नी पत्युर्धनहारी यास्याद् अभिचारिणी।
तदभावे तु दुहिता यद्यनूढा भवेत्तदा॥

Then married daughters who are comparatively indigent.

The married daughter succeeds in default of the unmarried. Among married daughters, the sonless and indigent succeed first according to the Mitakshara Comparative poverty is the criterion by which the claims of married daughters are settled. (Audh Kumari *v.* Chandra Dai, I. L. R. 2 All. 561). A daughter who had not received any property from her father in his lifetime is not considered as "unprovided" if she is otherwise well off. (Dauno *v.* Darbo, I. L. R, 4 All. 243) The circumstance of having or not having a son is in Bombay indifferent. (Baku Bai *v.* Madhu Bai, 2 Bom. p. 5; Poli *v.* Noratun Baku, 6 Bom. p. 183.) In Mithila married daughters succeed equally, and no preference is given to those who are indigent or sonless.

Devananda excludes barren daughters.

2. Devananda Bhatta excludes barren daughters from succession; (Shmriti Chandrika, chap XI, S. 2, pp. 10, 21) and his authority used to be accepted in this respect in Southern India. (Doraswamy *v.* Oomamul, Mad Dec. of 1852, 177; Gocoolanund *v.* Wooma Dai, 15 B. L R. 405.) But it is now held in Madras that sonless or barren daughters are not excluded from inheritance by their sisters who have male issue, (Simmani Ammal *v.* Muttammal, I. L. R., 3 Mad. 265).

Nature of the estate taken by daughters.

3. It has been held by the High Court of Bengal and by the Privy Council that the right of a daughter, in respect of her deceased father's estate, is as limited under the Mitakshara law as it is in the Bengal School There is no authority in the Mitakshara for the ruling; but as the text of Katyana* is held to apply to the succession of widows even in cases governed by the Mitakshara, so the text of Paithinashi† quoted below may be held to apply to the succession of daughters, and to limit their right in a similar manner.

---

* अपुत्रा शयनं भर्त्तुः पालयन्ती गुरौ स्थिता।
भुञ्जीतामरणात् क्षान्ता दायादा ऊर्द्ध्वमाप्नुयुः॥

Katyana

† प्रेतायां पुत्रिकायान्तु न भर्त्ता द्रव्यमर्हति।
अपुत्राया कुमार्य्या वा स्वस्रा ग्राह्यं तदन्यथा।

Paithinashi cited in Dayabhaga, Chap. XI, Sec II, para 15.

Conflicting rulings as to daughter's estate.

Bombay High Court.

4. It has been held by the Bombay High Court that the daughter's right in respect of the estate which devolves on her as heiress to her father is absolute and unlimited. (Hari Bhat *v.* Damodar Bhat, I. L. R 3 Bomb. p. 171; Babaji Bin Narayan *v.* Balaji Ganesh, I. L. R 5 Bomb. p. 660.)

The Privy Council Bengal High Court.

Madras High Court.

5. It has been held by the High Court of Bengal and by the Privy Council that property inherited by a Hindu woman from her father does not, under the Mitakshara law, descend on her death to her heirs, but reverts to the nearest heir of the father. (Chotay Lal *v.* Chunnoo Lal, 22 W. R. 496; 3 C. L R. 465; Muttoo Vadaga Nadhu Tewar *v.* Dora Sing Tewar, I. L R. 3 Mad. 290.) If the text of Paithinashi be applied to every case governed by the Mitakshara then the ruling of the Bengal and Madras High Courts and of the Privy Council on the point is unexceptionable.

6. Though there is no express authority for this rule in the Mitakshara, yet it is supported to some extent by considerations of equity. If the daughter, on whom the paternal estate devolves, be held to take an absolute estate, then in the case of an unmarried daughter succeeding in the first instance, the married daughters and their children are excluded altogether. For this reason, the Courts of law may apply the text of Paithinashi to daughters, even in cases governed by the Mitakshara.

7. According to the Bombay High Court, the estate inherited by a daughter from her father goes on her death to her heirs and not to the heirs of her father. The decision is in accordance with the authority of Vyavahara Mayukha (Vijay Rangam *v.* Lakman, 8 Bomb. H. C. 244). It has been held that by the Hindu Law prevailing in the Bombay and Madras Presidencies, a daughter is not debarred by incontinence from succession to the estate of her father (Adayapa *v.* Rudrapa, I L R., 4 Bomb., p. 105; Kojiyadu *v.* Laksmi, I. L. R, 5 Mad. 149.)

Effect of unchastity

SECTION III.

DAUGHTER'S SON.

1. In the absence of all heirs down to the married daughter, the daughter's son succeeds as heir to the separate and self-acquired property of a deceased person according to the Mitakshara. There is no mention of the daughter's son in Jagnyavalkya's text. But in order to establish harmony with other texts, Vijyaneshwar says, that by the import of the particle "also" after the word "daughters" in the text, it is meant, though not expressly mentioned, that the daughter's son succeeds after daughters.

2. If the text of Katyana be held to apply to all female heirs, then the daughter's son cannot succeed as heir on the death of his mother, so long as she has a single sister surviving her. Where several daughters succeed, then on the death of one, the others would take either by survivorship or heirship. As widowed and sonless daughters are not excluded under the Mitakshara law, it does not make much difference, so far as the daughter's son is concerned, whether the property is taken by survivorship or heirship. If the daughters effect a partition of their paternal estate still, on the death of one, her sons, would not succeed, before her surviving sisters

The right of sisters to take by survivorship or heirship before the sons of a deceased sister

3. On the death of the last surviving daughter, the estate goes to the daughter's sons. The latter take *per capita* and not *per stirpes* according to the principle "partition is equal in the absence of special texts to the contrary." There is a text of Gotama quoted in chap II, sec. XI, para 16 of the Mitakshara to the effect that partition may be made, according to the mothers. But in the case of Stridhan grand-daughters succeed as daughter's daughter; whereas in the case of succession to the maternal grandfather, the grandson succeeds as such. However that be, it is now settled that daughter's sons take *per capita* and not *per stirpes* according to the Mitakshara (Ram Swarath Panday *v.* Babu Basdeo Sing, Agra H C 168.)

Take per capita and not per stirpes

Reason.

4. A daughter's son on whom the inheritance has once devolved takes it as full owner, and thereupon he becomes a new stock of descent On his death, the succession passes to his heirs, and not back again to the heirs

Daughter's grandson cannot take as a near heir.

of the grandfather. (Sibta *v.* Badri Pershad, I. L. R. 3 All. 134.) But until the death of the last daughter capable of being an heiress, he takes no interest whatever and can transmit none. Therefore if he should die, before the last of such daughters leaving a son, that son would not succeed as heir, on the death of the last surviving daughter or widow of his father's maternal grandfather.

Daughter takes an absolute estate in Bombay

5. In Bombay, daughters take an absolute estate in the property of their fathers; and after the death of a daughter, her sons succeed to the estate as her heirs, and not as heirs to her father. The result is, that in Bombay the daughter's son succeeds on the death of his mother, even when there are other daughters of the mother's father, living at the time.

and on her death her sons take as her heirs.

Mithila authorities

6. The daughter's son is not enumerated in the list of heirs by Yajnavalkya; and from this it was at one time suggested by some commentators that his right does not accrue till all those who were enumerated had been exhausted. Mr. Macnaghten also states that he is not recognized as an heir by the Mithila School. But this is incorrect. It is now settled, after an elaborate examination of all the Mithila authorities, that the daughter's son is admitted by them after the daughter just as elsewhere, (Surjakumari *v.* Gandharp Sing, 6 S. D. 140)

SECTION IV.

MOTHER AND FATHER.

Mother takes before father under the Mitakshara.

1. The daughter's son is the only cognate, who, on account of special texts, is included in the group of propinquous heirs. The other cognates, however near in point of kinship, cannot inherit, so long as there is any agnate

2. In default of the daughter's son, the property goes upwards to the parents. But there is a conflict as to whether the father or the mother succeeds. Vijnaneshwar decides in favour of the mother, on the ground that the word mother presents itself first in the compound word to which the expression पितरौ is resolvable. Vijnaneshwar also says "the father is a common parent to other sons, but the mother is not so; and since her propinquity is

consequently greatest, it is fit that she should take the estate in the first instance conformably with the text "To the nearest *Sapinda* the inheritance next belongs" (Mit. chap. II, sec. III, para. 3). So long as the mother lives it is certainly inequitable that the step-mothers should derive the same benefit from the estate of the deceased as the mother herself, which is the real ground of the Mitakshara doctrine, though not so mentioned.

3. Vijnaneshwar's arguments are rejected by Nilkanta, (Vyavahara Mayakhu, chap. IV, sec. 8) and in Gujerat the father is preferred to the mother as heir to their son, (Khodha Bhai Mahy *v.* Bodhur Dala, I. L. R. 6 Bom. 541.)

Contrary doctrine accepted in Gujrat and Southern India.

4. The Shmriti Chandrika also gives priority to the father, Calcutta Edition, pp. 70, 71.

5. Vachaspati gives priority to the mother on the ground of propinquity.

6. The reason given in the passage of the Mitakshara cited above, shows that a step-mother is not intended to be included in the word mother in the texts which enumerate the heirs to a sonless man. It has been, therefore, held that neither a step-mother nor a step-grandmother can succeed as heiress to a step-son or step-grandson (Lala Joti Lal *v.* Darani Cowar; Lal Kowor *v.* Babu Jaikaran Lal, B. L. R. Sup Part, p. 67; I L R. 5 Mad 32)

7. In the Presidency of Bombay the wives of Gotraja Sapindas are admitted as heirs; and although it is settled that a step-mother cannot inherit as mother, yet the question is still undecided there, whether the step-mother can or not inherit as wife of a Gotraja Sapinda (see the remarks of Westrop, C. J in the case of Kissorbai *v.* Valab Raoji, I. L. R. 4 Bom. 208).

Whether a step-mother can inherit in Bombay the wife of a Gotraja Sapinda

8. In the case of Panchanand Ojha *v.* Lal Sham Misser, (3 W. R. 140) it was held by the High Court of Bengal that property inherited by a mother from her son is not her Stridhan. The High Court of Madras has also held that the property which a mother inherits from her son does not become her Stridhan, (P. Bachi Raju *v.* Venkatapada, 2 Mad. 402)

Estate taken by mother not her Stridhan

9. The estate which the mother takes in the property of her deceased son is, according to the Bombay High Court, similar to that which a widow takes in that of her deceased husband (Tulja Ram Morarji *v.* Mathuradas and others, I. L. R. 5 Bomb. p. 662).

Section V.

BROTHERS AND THEIR SONS.

Brothers of the whole blood succeed before those of the half blood.

1. Brothers of the whole blood succeed in default of parents. If there be no brother of the whole blood then those of the half blood succeed. If there be no brothers of the half blood, then the sons of brothers of the whole blood succeed. In default of the latter the sons of half brothers succeed. No distinction is made on the ground of whole or half blood between the descendants of remoter ancestors, (Samat *v.* Amra, I. L. R. 6 Bom. p. 394.)

In an undivided family brothers, nephews, &c all take by survivorship.

2. So long as there is a brother of the whole or half blood, a nephew cannot succeed. But inheritance is vested at once on the death of the owner. The result is, that if there be several brothers living in a state of union, but separate from the deceased, then all the brothers take a vested interest. Under the circumstances, the nephews take nothing; and at the time of partition, the brothers, who were living when the succession opened, may divide the heritage as their self-acquired property, to the exclusion of the sons of predeceased brothers. If any one, living in a state of union with his brothers and nephews, dies, without leaving male issue, then the extent of interest of the brothers and nephews is increased. The nephews gain as much as the brothers But while there are brothers surviving, the sons of predeceased brothers cannot take any share in the estate left by a deceased person living separate from them, nor in his self-acquired property even though he died as a member of the joint family. Mit chap. II, sec. IV, paras 8-9

But brothers take before nephews if the deceased lived separate at the time of his death.

Brother's grandsons not expressly mentioned in any text.

3. Brother's grandsons are not expressly mentioned as heirs in the Mitakshara. They come under the class Gotrajas. But if it be that they inherit as Gotrajas then they must come in after all the Sapinda heirs expressly mentioned in the Mitakshara. According to Vajnaneshwar, the order of succession is determined by nearness of kinship, (Mit. chap. II, sec. IV, para. 5). But this rule avails little in a case like the one under notice. The authority of Mitra Misra may be construed to be in favour of putting the brother's grandson before the grandparents. Vira Mitrodaya, chap. III, Part VI, para. 2. But his spiritual theory is altogether at variance with the

His position in the list of heirs.

doctrine of the Mitakshara. To me it seems that by the principle of parity of reasoning (बांटविकन्याय) the brother's grandson ought to be placed before the grandparents. As the great-grandson of the deceased succeed before his parents, so the great-grandson of the father ought to inherit before the grandparents. There is nothing in the Mitakshara or in the texts which can be taken to exclude the great-grandson of the father, or prevent him from inheriting before the grandparents, and if the great-grandson of the father be admitted in the list of heirs, there is no other alternative than to place him before the grandparents, on the principle referred to above and also for the sake of symmetry.

4. In the text of Jagnyavalkya, the heirs of the father are enumerated in the following order :—

1. Brothers.
2. Brother's sons.
3. Gotrajas.

The brother's grandson may be included either in the expression "Brother's son" or in the expression "Gotrajas." In the commentary of Vijnaneshwar the expression "brother's son" is apparently taken in its literal sense; and the Gotraja series of heirs apparently begins with the grandparents. But there is nothing in the Mitakshara to show that the brother's grandson cannot be placed before the grandparents.

It has, however, been held by the High Court of Madras that the paternal uncle's son succeeds to the inheritance before a brother's grandson. (Suraya Bhukta *v.* Lakmi Narasamma, I. L. R. 5 Mad. 291) As the question under consideration is very ably discussed in the judgment, the following passages are quoted below, in order to show how the controversy stands.

"The claim of the brother's grandson to priority of succession over the uncle's son has been supported by the following arguments:—(*a*) that the term "sons" in Mitakshara, chap. II, sec. IV, § 7 and sec. V, § 1 must be construed as including grandsons, (*b*) that the brother's grandson is a Sapinda, and that no other place is assigned to him in the table of succession by Vijnaneshwar, (*c*) that he is nearer by consanguinity than Sapindas who are mentioned; and (*d*) that by the Hindu writers by

whom he is expressly mentioned, he is placed next in succession to the brother's son.

"The argument that 'brother's sons' in the passages mentioned includes grandsons was originally employed by Mr. Harrington, to sustain a contention which is now established by decision, that the tables of gentiles and cognates given in the Mitakshara are not exhaustive, and that the sixth descendant of a sixth ascendant is entitled to succeed in preference to a mother's sister's son. The argument is not necessary to Mr. Harrington's conclusion, for the person whose claims he held should prevail would succeed as included in the class of Gotraja sapindas. Its correctness has been disputed by Sanskrit scholars. See Mandalik's note on the Vyvahara Mayukha, p. 360, and it appears to us that it cannot be maintained. Where words have a primary and particular import, and also a secondary and more extensive import, they are generally to be understood in their primary sense, unless the context shows that they were used in the more extensive sense.

"The passages cited to show that in the Mitakshara, the word 'son' is used in the more extensive sense, were chap. I, sec. I, § 3, chap. II, sec. I, § 1. In both these places, it is apparent from the context that the larger sense is intended: in both, the author refers to the successors whose inheritance is not liable to obstruction, and we doubt whether any instance can be shown in which the term 'son' includes grandson, except in cases in which the grandson takes by right of representation.

"In the passages we are called upon to construe, there is not only nothing in the context to necessitate the adoption of the more extensive signification, but if it be adopted to the same extent as is required in the passages cited, its adoption creates a new difficulty. In the passages cited, it includes the great-grandson who is entitled to succession in priority to the widow, but by no authority, so far as we are aware, is the great-grandson of the brother ranked among near Sapindas, and on principle he could not be, for he is a sapinda of divided offering. Again Vijnaneshwar (Mitakshara, chap. II, sec. V, § 2) places the grandmother first in the succession immediately after brother's son. He adverts to the text of Manu, 'and the mother being also dead, the father's

mother shall take the inheritance' and explains the reason that the place to which in virtue of this text she is apparently entitled is not assigned to her. Alluding to the text of Jagnyavalkya he says, 'no place is found for her in the compact series of heirs from the father to the nephew * * * * she must, therefore, of course succeed immediately after the nephew.' The term 'nephew' may perhaps be susceptible of the larger interpretation so as to include a nephew's son, but it is unlikely that the author who considered the text of Manu, chap. IX, 217 constrained him to postpone the grandmother to the heirs actually mentioned by Jagnyavalkya, would not have expressly mentioned the nephew's son, had he too been entitled to priority to her.

"The 4th paragraph repeats the rule, 'Here on failure of the father's line (*Santana*) the heirs are successively the paternal grandmother &c.' The term '*Santana*' in this passage is explained by Visheshwara in the Subodhini 'the line of the father must be understood to end with the brothers and their sons. Next to the paternal grandmother, the Mitakshara places the paternal grandfather, the uncles and their sons. On failure of the paternal grandfather's line (*Santana*) the paternal great-grandmother, the great-grandfather, his sons and their '*sunava*' which Mr. Colebrooke translates 'issue' Mr. Mandlik 'sons.'"

"In two out of the series of collaterals mentioned, the term 'son' alone is used. The term 'line' is explained by commentators on the Mitakshara of some authority, to extend only to brothers and their sons, and the third series of collaterals is concluded with a term which strictly interpreted, signifies sons. We may repeat that we desire not to be understood as suggesting that the list of persons who would succeed as Gotrajas is exhausted by those expressly named We have sought to show by an examination of the whole section that the more extended sense of the term "son" is not required by the context, and that the primary sense appears to be the sense more consistent with it. But the strongest objection to the adoption of the larger sense of the term, is afforded by the writings of authors, who succeeded Vijaneshwar, and more or less followed his teaching. With a single exception of no high authority, the writers of this

school who are available to us mention only brother's sons as entitled to succeed in priority to the grandmother, and one of them expressly declares that brother's grandsons are not entitled to such priority.

"The argument that brother's grandsons are Sapindas, and that no other place is assigned to them by Vijnaneshwar would no doubt be entitled to considerable weight, if the table given by him was exhaustive, and if it followed from the construction we consider more correct that no place could be assigned to them.

"The argument that in respect of consanguinity, he is nearer than sapindas who are mentioned would also be of weight, if consanguinity were the sole ground of preference indicated by the author of the Mitakshara.

"The argument that by those of the commentators by whom he is expressly mentioned, he is placed immediately after the brother's son, would certainly afford a presumption in his favour, unless it was shown that these authors belong to a school which had adopted a principle of succession at variance with that adopted by the school of the Mitakshara."

There is certainly considerable force in the arguments contained in the above extracts. But notwithstanding a great deal that can be added to their force, they are not unanswerable. For the sake of symmetry and completeness, it seems desirable that the brother's grandson should be placed before grandparents.

Section VI.

GOTRJAS.

) are jas.

1. In default of all those descendants of the father who inherit as propinquous Sapindas the heritage goes to the Gotrajas or descendants within seven degrees, of male ancestors within seven degrees. The word Gotraja literally means 'sprung from the Gotra'; and those who are connected by blood through females may well be taken as included in the term. But, according to Vijnaneshwar, Sapindas of a different Gotra are included under the term Bandhu, in the text of Jagnayavalkya. The Bandhus therefore succeed after Gotrajas, according to the Mitakshara.

2. Though the word Gotraja literally means "born in the Gotra" yet Vijnaneshwar apparently takes the grandmother and great-grandmother under the term. The idea of the author seems to be that being the wives of Gotraja Sapindas, they are also Gotraja Sapindas themselves. But, on the same principle, the widows of paternal uncles &c are entitled to be regarded as Gotraja Sapindas. In the Bombay Presidency, the widows of all Gotraja Sapindas are held entitled to inherit. There is nothing in the Mitakshara to shew whether the author intended to include the widows of all Gotraja Sapindas in the list of heirs. The question will be discussed in the next section.

Grand-mother & great-gra mother & included among G rajas in t Mitakshi

On the same pri ciple the wives of other Go rajas oug to be reg ed as Got

3. In order to reconcile the text Jagnyavalkya with that of Manu, Vijnaneshwar divides Gotrajas into the two following classes:

Gotraja Sapindas herit bef Gotraja S anodakas

1. Gotraja Sapindas
2. Gotraja Samanodakas.

Sapindas of different Gotra being included under the term Bandhus, they are placed after Gotraja Samanodakas in the Mitakshara. In this respect the order of succession, as laid down by Vijnaneshwar, is at variance with the well-known text of Manu which Vijnaneshwar expressly takes as his guide. However that be, there can be no doubt that the several classes of heirs succeed in the following order according to the Mitakshara:

Gotraja Samana-dakas tal before Bhinna G tra Sapir accordin the Mita shara.

1. Gotraja Sapindas,
2. Gotraja Samanodakas.
3. Bhinna Gotra Sapindas.

4. The question next arises what is the rule by which the order of succession among Sagotra Sapindas is to be determined. According to Vijnaneshwar nearness of kinship is the test, to which some would add that of spiritual benefit on the authority of Apararka and Viramitrodaya. But the doctrine of spiritual benefit being expressly repudiated in the Mitakshara, it cannot be taken as a guide in expounding that treatise. Even if it be taken as the guiding principle, still it would be of little use for solving all those questions which arise in determining the order of succession.

Order of Successi among Sagotra Sapinda

5. The reader should remember that the male descendants within the 7th degree from a common paternal

ancestor not removed more than seven degrees are Sagotra Sapindas. Their wives are also Sagotra Sapindas; and may inherit unless it be held that they cannot inherit at all except, under special texts.

The principle of nearness of kinship is the test according to Vijnaneshwar; but it is of no use in certain cases.

6. Leaving out of consideration the wives of Sagotra Sapindas for the present, it would appear that the Gotraja Sapindas are male agnates within seven degrees of ascent and descent. Vijnaneshwar says that the order of succession among these, is to be determined by the test of nearness of kinship. But by that test only it is not possible to determine whether the great-grandson of the father is nearer than the son of the grandfather.

7. The order of succession as laid down by Vijnaneshwar is given in page 272 *ante*. On going through the same, it will appear that Vijnaneshwar has left it incomplete. To complete the list is the question. But before proposing any solution, it is necessary to enable the reader to see clearly how the controversy stands What Vijnaneshwar says on the point is therefore quoted below.

"If there be not even brother's sons, gentiles share the estate. Gentiles are the paternal grandmother and Sapindas."

"In the first place, the paternal grandmother takes the inheritance. The paternal grandmother's succession immediately after the mother, was seemingly suggested by the text before cited. "And the mother also being dead, the father's mother shall take the heritage:" no place, however, is found for her in the compact series of heirs from the father to the nephew: and that text (" the father's mother shall take the heritage") is intended only to indicate her general competency for inheritance. She must, therefore, of course succeed immediately after the nephew; and thus there is no contradiction."

"On failure of the paternal grandmother, the (Gotraja) kinsmen sprung from the same paternal ancestor with the deceased and (Sapindas), namely, the paternal grandfather and the rest, inherit the estate. For kinsmen connected by blood, but of different Gotra, are indicated by the term cognate (*Bandhu* ")

"Here on failure of the father's decendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons."

"On failure of the paternal grandfather's line, the

paternal great-grandmother, the great-grandfather, his sons and their issue inherit. In this manner must be understood the succession of Sagotra Sapindas to the seventh degree." (Mitakshara, chap. II, sec. V.)

8. Although the great-grandsons and other remoter descendants of the paternal ancestors are not expressly mentioned as heirs, it is now settled that they do inherit according to the Mitakshara. In the case of Thakoor Jeebnath Sing *v.* The Court of Wards it was contended that, according to the Mitakshara, "collateral succession is limited to the grandson of the common ancestor, and on failure of these the cognates succeed." But this contention was overruled by the High Court of Bengal Couch, C. J. in delivering judgment remarked that "if this be the interpretation, the author of the Mitakshara does not expound the text of Jagnyavalkya by stating the order in which the gotrajas or gentiles are to succeed; but he makes a different rule of succession by which some of them are altogether excluded from the inheritance, the text of Jagnyavalkya being that on failure of the gentiles the cognates are to succeed." 5 B. L. R. 519 In the case under notice the great-grandson of the great-grandfather of the deceased owner's grandfather was held entitled to inherit before a cognate.

Grand nephews and other remoter Sapindas are entitled to inherit as Sapindas.

9. The right of remote Sagotra Sapindas to inherit is beyond dispute. The cases noted below may be referred to as authorities on the point* The only question is in what order the remote Sagotra Sapindas succeed Various principles are suggested But all these are open to some objection or other. (See West and Buhler, 3rd Edition, pp. 124, 125.)

The order of succession among remote Sagotra Sapindas.

10. The principle suggested by Mr Harrington is, that each line should be continued to the seventh person in descent, so that the grandparents and their sons would be excluded by the great-grandson of the great-grandson of the father. This arrangement can hardly be said to be consistent with the Mitakshara According to Vijnaneshwar, the order of succession is determined by nearness of kinship, (Mit. chap. II, sec. III, paras. 3, 4).

Test proposed by Mr. Harrington.

---

* Mussamut Ooraya Koer *v* Rajoo Nye Sookoel, 14 W R 208; Kareem Chand *v.* Oodung Gurrain, 6 W R 158, Rani Padmavati *v* Doolar Sing 1 Suth P C R 178, Koer Golab Sing *v* Rao Kurrun Sing, 2 Suth. P. C R 474, Ram Sing *v* Ugur Sing, 2 P. C. J. 566.

37

On this principle it can hardly be said that the nephew's great-grandson is a nearer kinsman than the paternal uncle.

Raj Coomar Sarvadhicari.

11. Pandit Raj Coomar Sarvadhicary says that the order of succession among Sagotra Sapindas ought to be determined on the principle of spiritual benefit. But according to the Mitakshara, nearness of kinship is the test by which the order of succession ought to be determined; and even supposing that there is sufficient authority for the adoption of the spiritual theory, in the Vira Mitrodaya and other authoritative works of the Benares School, yet it ought to be avoided in the exposition of the Mitakshara which is altogether against it. It will be shown in the next chapter, that the principle of spiritual benefit is a mere speculative theory which Hindu lawyers even of the Bengal School do not take as their guide in actually working out the order of succession. The Bengal lawyers refer to it very frequently in order to give additional support to conclusions otherwise established. But it is never accepted as an independent guide. To apply the doctrine for the purpose of expounding the Mitakshara is neither necessary nor justifiable

12. Adopting the principle of spiritual benefit on the authority of Apararka and Vira Mitrodaya, Pandit Sarvadhicari has divided Sagotra Sapindas into the two following classes:—

1. Propinquous Sagotra Sapindas.
2. Remote Sagotra Sapindas.

On the principle of spiritual benefit, the propinquous Sagotra Sapindas who are connected through the Parvana Pinda, must inherit first, if it be admitted, for argument's sake, that the giver of the Parvana is the greatest benefactor to the soul of a deceased person. But it is very doubtful whether the giver of the Parvana is entitled to such pre-eminence. Even, admitting the importance of the Parvana Pinda, the principle not only fails to afford an unfailing test, but on the contrary, raises fresh difficulties. The question will be fully discussed in the next chapter.

13. Pundit Sarvadhicari has subdivided the propinquous and the remote Sagotra Sapindas, and has fixed the order of succession among them as follows:

Class	Order
1. Propinquous Sapinda heirs.	1. The three immediate descendants of the deceased. His widow daughter, &c.
	2. The mother, the father and their three immediate male descendants.
	3. The grandmother and the grandfather with their three immediate descendants.
	4. The great-grandmother and the great-grandfather with their three immediate descendants.
2. Remote Sogatra Sapinda heirs.	5. The three remote descendants of the deceased
	6. ditto ditto in the father's line.
	7. ditto ditto in grandfather's ,,
	8. ditto ditto great-grandfather's
	9. The 4th in ascent with his 3 immediate descendants.
	10. The 5th ditto ditto ditto
	11. The 6th ditto ditto ditto
	12. The 3 remote descendants of the 4th ancestor.
	13. ditto ditto ditto 5th ditto
	14. ditto ditto ditto 6th ditto

14. This arrangement is not only symmetrical, but has the merit of bringing about harmony between the several schools, and can be deduced from the text of Jagnyavalkya independently of the theory of spiritual benefit. The only objection against it is, that it is apparently inconsistent with what is expressly or by implication laid down in the Mitakshara as to the order of succession among the class. On going through the passages of the Mitakshara quoted in page 288, it would appear that, in the opinion of the author, the great-grandson of the father cannot inherit before the grandparents. But Vijnaneshwar does not expressly postpone the great-grandson and remoter descendants ; and it is quite open to his followers to put the brother's grandson before the grandparents. For the sake of establishing harmony with the other schools, so far as is possible, and for the sake of symmetry I should think that the order of succession as indicated above may be accepted. The great-grandson of the deceased himself has priority over the parents. So, by the principle of parity of reasoning, the father's great-grandson may

be placed before the grandparents, and the grandfather's great-grandson may be placed before the great-grandparents.

15. The principles by which the order of succession is determined by Hindu lawyers of all the Schools are the following:—

1. Express texts.
2. Indications contained in texts, *e g.*, that inheritance never goes to remoter lines, if there be one within certain degrees in a nearer line.
3. Principle of parity of reasoning सांदृष्टिकन्याय
4. Nearness of kinship.
5. Symmetry and completeness.

The order of succession as mentioned above may be supported on all these principles, independently of the doctrine of spiritual benefit which is altogether inconsistent with the Mitakshara According to the decision of the Madras High Court the order of succession among Sagatra Sapindas is different from that indicated above, it being laid down that paternal uncle's son succeeds before brother's grandson, Suraya *v.* Luksmi, I. L. R. 5 Mad 291.

Section VII.

FEMALE HEIRS.

Females inherit under special texts.

1. It has been held by the High Court of Allahabad that no female can inherit except under special texts (Gauri *v.* Rukkoo, I. L R 3 All p 45). There are special texts in favour of four out of the five females who are expressly included in the list of heirs in the Mitakshara. There is no text in favour of the paternal great-grandmother But if the mother and grandmother be heirs, then this great-grandmother is also one, on the principle of parity of reasoning.

2. In the Mitakshara, it is nowhere laid down that females cannot inherit except under special texts. The text of Baudhayana* which is the foundation of the doctrine is neither quoted nor commented upon in the Mitakshara. But the order of succession laid down by Vijnaneshwar evidently shows that, in his opinion, no female can succeed

---

* न दायं निरिन्द्रिया ह्यदायाश्च स्त्रियो मताः ।

ccept under special texts. The text of Baudhayana quoted in the Viramitrodaya, and according to that text is laid down by Mitra Misra that no females can in-erit excepting those with regard to whose succession ere are special texts. It is, therefore, now settled that the Benares School the only females who can inherit e:

The females who are entitled to inherit.

1. Widow.
2. Daughter.
3. Mother.
4. Grandmother.
5. Great-grandmother.

Text in favor of sister.

3. It appears from the Digest of Jaganatha that there a text of Sancha and Likhita in favour of the sister. ut this text is not usually quoted in authoritative works, cording to the rules of interpretation recognized by indu Jurists, it ought to be regarded as अमूल and want-g in authority.

Wives of Gotraja Sapindas and sisters inherit according to Mayukha.

4. In the Bombay Presidency not only sisters but the ives of Gotraja Sapindas are admitted as heirs. Ac-rding to the Mayukha the authority of which is para-ount in Bombay and in Gujrat, sisters inherit after e grandmother on the ground of being Gotrajas. ilkanta says, "In case of the non-existence of that (the aternal grandmother) the sister (takes) according to the ctum of Manu that "whoever is the nearest to the ceased sapinda his should be the property" * * * e the sister being born in the brother's Gotra, and there being no difference of Gotrajata, (the quality being born in the Gotra). But (says an objector) ere is no sagotrata (quality of having some gotra). rue, but neither is that stated here as a reason for king property. (Mayukha, Bom. Edition of 1826, p. 141).

5. Nanda Pandita and Balam Bhatta consider that e word brother in the text of Yajnyavalkya includes so sisters, on the principle that words used in the asculine gender denote also persons of the female sex, iless there is something in the context, or in the nature the subject matter which is repugnant to such con-ruction. Nilkanta rejects the interpretation put upon e word "brethren" in the text by Nanda Pandita and alam Bhatta. But he brings in the sister after the randmother as stated already.

Venayek v. Anandarao Luxmi Bai.

6. In the case of Venayek Anand Row *v.* Luxmi Bai, the Privy Council held, on the authority of Nilkantha as well as Nanda Pandita and Balambhatta that the sister is an heir in Bombay; and that she inherits before paternal first cousins. Though the authority of the Mayukha is paramount only in the island of Bombay and in Gujrat, yet it has been subsequently ruled that the decision in Venayek Anandarao *v.* Luxmi is of general authority in the Presidency of Bombay, except where an invariable and ancient usage to the contrary is alleged and proved (Sakharam *v.* Sitabai, I. L. R. 3 Bom. p. 353). It was held in the latter case that the full-sister and not the half-sister is entitled to succeed as heiress to the estate of a deceased brother.

7. According to the Bengal High Court, a sister cannot be heiress to a deceased brother under the Mitakshara, (Mt Guman Kumari *v.* Sree Kanta Neogi, Sev. 460, 9 I. L. R. Cal.)

A sister cannot take as heiress according to the Benares School.

8. In the North-West, the title of a sister to inherit was set up in a case for the first time in the Privy Council. But the Judicial Committee refused to enter upon the question. (Koer Golab Sing *v.* Roa Kurun Sing, 14 M. I. A. 176.)

9. In the Punjab, among the Sikhs and Jats the sister is excluded by long established usage, (Punjab Custom, p. 70.)

Madras decisions on the point.

10. In Madras, it used to be held formerly that a sister cannot inherit as heiress to a deceased brother, (Chinna-Samin *v.* Kootoor Chinna Narain, Madras, Dec. of 1858, 175). But in a later case, it has been held by the Madras High Court that a sister is entitled to succeed, Kuttir Ammal *v.* Radha Krishan Ayam, 8 Mad. H. C. 88. Mr. Mayne in his treatise on Hindu Law takes exception to this decision. But it has been approved by the Madras High Court in the case of Luksman Ammal *v.* Timvengada (I. L. R. 5 Madras, 245). The question is very ably discussed in the judgment delivered in the latter case. The natural claim of the sister is so great that it is certainly desirable to admit her in the list of heirs, if it be possible to do so consistently with the texts.

Sisters take equally when they inherit.

11. Where sisters inherit, as in the Bombay Presidency, they take equally. The unendowed has not preference over the one provided for, as in the case of daughters, (Bhagirati Bai *v.* Baya, I. L. R. 5 Bomb. p. 264.)

12. The property inherited by a sister from her deceased brother is stridhana; and the course of inheritance to such property is apparently the same as that in respect of the estate inherited by a daughter from her father, as laid down in Vijaya Rangama *v.* Laksman, 8 Bomb. p. 264.

The es taken by sister is lar to th the daug

13. The principle on which Nilkanta includes sisters among Gotrajas, would also place the daughters of all male Gotraja Sapindas among the same class of heirs. But it has been ruled that even in Gujrat, where the authority of Mayukha is paramount, the paternal aunt cannot be recognized as a Gotraja Sapinda. (West and Buhler, page 131.

Patern aunt is r an heire even in Bombay

14 It is now settled that in the Bombay Presidency the widows of Gotraja Sapindas succeed as heiresses where their husbands would succeed, if they lived. In the case of Lalubhai *v.* Mankuverbai it has been ruled that the widow of a first cousin on the paternal side has a title to succeed in preference to male Gotraja Sapindas who were seventh in descent from the common ancestor. There is not any authority for the ruling in the Mitakshara or in the Mayukha, but it is based on positive acceptance and usage. (I. L. R. 2 Bomb. 395; I L. R. 5 Bomb 110)

Wido of Gotr Sapind

15. The widow of a collateral does not take an absolute estate in the property which she inherits as Gotraja Sapinda of her husband's agnates Bharman Gavda *v.* Rudrapa Gavda, I. L R. 4 Bomb. 181.

Wid collate do not an abs estate.

16. According to the Benares School females who are is not expressly named in the texts cannot inherit, (Gauri *v.* Rukko, I. L. R. 3 All. p. 45.)

Section VIII.

SAMANODAKAS.

1. On failure of Sagotra Sapindas, the inheritance goes to the Samanodakas or agnates beyond the seventh degree, known to be descended from a common male ancestor, in unbroken lines of male descent. Vrihat Manu says, "The relation of Sapinda ceases with the seventh degree, and that of *Samanodakaship* or connection by a common libation of water extends to the fourteenth degree; or, as some affirm, it reaches as far as the memory of birth and name extends.

Wh Sama kas.

2. Samanodakas are not expressly mentioned in the text of Yajnyavalkya. But they are included in the term Gotraja in the text. Jimutavahana takes the word Gotraja to denote only Gotraja Sapindas But, according to the plain meaning of the word, it denotes Sapindas as well as Samanodakas. Vijnaneshwar takes the word to mean Sagotras. He is, therefore, obliged to put the Samanodakas before Bandhus who are, according to him, Sapindas connected by blood through females

3. The order of succession laid down by Vijnaneshwar is open to the objection that, according to it, Samanodakas inherit before Sapindas of different Gotras. Whereas according to the texts of Manu, Apastamba and other holy sages, Sapindas whether of the same or of different Gotra, have priority over Samanodakas. It is quite possible that the Bandhus were not recognized at all by any other legistator besides Yajnyavalkya The Bandhus being recognized by the Sanhita of Yajnyavalkya, Vijnaneshwar, in commenting upon the same, found it incumbent upon him to reconcile the text of Jogeeshwar withe that of Manu and Apastamba. There were but two way. I. open to him. He could place the Bandhus either before or after Sakulyas in the text of Manu.* Bandhus being so defined by him as to include a very large number of distant cognates, he could not place them before Sakulyas. There were also other considerations which apparently led him to reject that alternative. If Sakulyas be placed after Bandhus, then the plain meaning of the word Gotraja, in the text of Yajnyavalkya must be narrowed so as to denote only Sagotra Sapindas. Then again, the Sakulyas must be interpolated in the text of Yajnyavalkya after Bandhus instead of being held to be included in the class Gotraja. All this involves गौरव, and a Hindu lawyer would avoid such गौरव, if possible In the case under consideration, the alternative was between गौरव and inappropriateness on the one hand, and the necessity of admitting that there is an irreconcileable difference between the texts of Rishis. The consideration of in-

---

* अनन्तरः सपिण्डाद्य स्तस्य तस्य धनं भवेत् ।
अत ऊर्ध्वं सकुल्यः स्यादाचार्य्यः शिष्य एव वा ॥

Manu IX, 189.

appropriateness led Vijnaneshwar to reject the alternative of placing Bandhus before Sakulyas. To reconcile an apparent difference between Yajnyavalkya and Manu he would have resorted to any mode of interpretation, however objectionable. But he was legislating for the country; and he could not expound the texts of the sages, in such manner, as to lay down rules which could never be acceptable to the people. The difficulty arose in consequence of the definition of the term Sapinda which Vijnaneshwar accepted. If he could define the term so as to include a very small number of near cognates, he might have placed the cognates before the distant agnates called Samanodakas. But the conception of sapindaship, finally worked out by Jimutavahana was unknown in Vijnaneshwar's time. The author of the Mitakshara could not see how the brother, the nephew, or the paternal uncle could be connected through the Parvana Pinda. Far less could he see how the maternal relations can be shown to be connected by Parvana Pinda. He therefore defined the term Sapinda to denote all the descendants of a common ancestor within certain degrees. But this definition necessarily included a very large number of distant cognates who could not well be placed before Samanodakas.

4. At a later time, Jimutavahana showed that it is better to define the term Sapinda in such manner as to denote only those who are connected through the Parvana Pinda. Even before Jimuta, it was shown by Aparaditya that connection through the Parvana Pinda exists between brothers, nephews, paternal uncles, &c. Jimuta shewed, for the first time, that the connection exists between maternal relations also. Thus the word Sapinda was defined so as to include agnates within three degrees in the paternal line, and also cognates in the maternal line within the same number of degrees. The number of cognate Sapindas being reduced by the definition adopted by Jimutavahana, he placed them before Sakulyas. But Vijnaneshwar could not hit upon the definition suggested by Jimutavahana, at a later time; and he was obliged to place cognate Sapindas after agnate Samanodakas.

Section IX.

BANDHUS OR COGNATE SAPINDAS.

With the exception of the daughter's son all cognates succeed after agnates.

1. Cognate Sapindas or Bandhus succeed after Gotrajas according to Jagnyavalkya's text. Gotrajas, according to Vijnaneshwar, include all agnates descended from a known common ancestor. The result is, that the cognates cannot succeed so long as there is a single agnate. The daughter's son succeeds as a near heir. But he does so under special texts. With the exception of the daughter's son, no cognate can inherit while there is any agnate or *gnati* as we say.

Who are agnates.

2. Cognates are Sapindas of different Gotras. All those who are descended from a common ancestor, and are within seven or five degrees are Sapindas, according to Vijnaneshwar's definition of the term. It must be obvious that these Sapindas cannot be all of the same Gotra. Those descended from a male ancestor, in unbroken lines of male descent, are of the same Gotra But those connected by blood through females must be of different Gotras to that of the common male ancestor, and his male descendants.

The order of succession among cognates so far as laid down expressly in the Mitakshara.

3. With regard to the succession of cognates Vijnaneshwar says—"On failure of agnates, the cognates are heirs. Cognates are of three kinds: related to the person himself, to his father or to his mother, as is declared by the following text—"The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle, must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle must be reckoned his mother's cognate kindred."

Texts of Virdha Satatapa quoted in the Mitakshara.

"Here by reason of near affinity the cognate kindred of the deceased himself are his successors in the first instance: on failure of them, his father's cognate kindred, or if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended." (Mit. chap. II, Sec. VI.)

Apparent inconsisten cy in the Mitakshara settled by the decision in

4. There was, at one time, considerable doubt as to whether the nine Bandhus enumerated in the texts quoted in para. 1 of the above extracts, are the only cognates who succeed as heirs, or is the enumeration of Bandhus only illustrative, and not exhaustive. The question is now set at rest by the judgment of the High Court of Calcutta in the case of Amrita Kumari *v.* Lakhi Narayan Chackravarti, (10 W. R 76) and by the judgment of the Privy Council delivered about the same time, in the case of Giridhari Lal *v.* Government of Bengal, (2 Suth. P C. R 160.)

Amrita Kumari v. Lakhi Narayn

Gridhari Governme of Bengal.

5. There can be no doubt as to correctness of the actual decision in the two cases cited above. But on referring to the original in the Mitakshara, it appears that the question should never have arisen. It is simply impossible that Vijnaneshwar, after defining the term Bandhus as denoting all the Bhinna Gotra Sapindas should, in the same breath, quote such texts as are palpably inconsistent with his definition. This fact alone should have sufficed to indicate that there must be some error in the translation. It has been laid down that the enumeration of cognates, in the texts in question, is illustrative, and not exhaustive. But such a view is inconsistent with the interpretation put upon the text by other authoritative writers; and the wording of the text leaves little scope for the view now generally taken.

The actu decision in the cases cited above is unexcep tionable.

6. The fact is, that the distinction between the word Bandhu which is used in the commentary portion, and the word Bandhava which is used in the texts, has not been noticed The words Bandhu and Bandhava sometimes mean the same thing. But Bandhava literally means the son of a Bandhu, and Bandhava is not unfrequently used to denote a cognate brother as we say. The cognate brothers are:

The sup posed inco sistency is due to ove looking th distinctio between Bandhava and Band

1. Paternal aunt's son (पितृस्वास्रेय).
2. Maternal aunt's son (मातृस्वास्रेय)
3. Maternal uncle's son (मातुलपुत्र).

7. The enumeration of the cognate brothers of a man himself and of his father and mother, is the immediate object of the texts; and in that respect the enumeration is exhaustive. Vijnaneshwar quotes the texts, not in

The en meration Bandhav in the te exhausti

order to enumerate the cognate heirs, but as an authority for the principle which he has laid down for determining the order of succession among the very large number of cognates whom he has admitted as heirs. The person nearest in point of kinship succeeds as heir to the deceased person according to the text of Manu. But, considering the definition of cognate relationship adopted by Vijnaneshwar, it is not possible to see at once that there can be any principle for determining who are nearest in point of kinship, and who are remote. Vijnaneshwar, therefore, quoted the texts to shew that the Bandhus may be classified in such manner as to admit of the application of the test of nearness of kinship to determine their order of succession. The texts and their application in other Smritis shew that the Bandhavas of the father and mother are regarded as Bandhus of the son. It, therefore, follows that the Bandhus of the father and mother are Bandhus of the man himself. The result is, that the Bandhus of the paternal grandparents and other distant ancestors are excluded from succession. The number of heritable Bandhus is thus materially diminished; and at the same time a principle is found for determining the order of succession among those who are recognized as heritable Bandhus. The Bandhus of a man himself are his cognate sapindas related through his mother. The cognate sapindas related through the father's mother are father's Bandhus; and the cognate sapindas related through the mother's mother are mother's Bandhus. That cognates related through the father's and mother's mothers are cognates of the man himself, follows from the texts of Vridha Satatapa which define who the Pitri Bandhavas and Matri Bandhavas are. The Pitri Bandhavas being Bandhus, the Pitri Bandhus are Bandhus. The grandfather's Bandhavas are not considered as Bandhus; and his Bandhus are not Bandhus for purposes of heirship, though they be within the prescribed degrees from the common ancestor.

The texts do not enumerate Bandhus either exhaustively or by way of illustration.

The object which the commentator had in view in quoting the texts.

8. That the word Bandhava, in the text of Vridha Satatapa, is used to denote cognate brothers, follows from the fact that all three Bandhus in each class stand on the footing of brothers. In this view it is not at all surprising that while a man's paternal aunt's son is classed among his own Bandhus, his father's paternal aunt's son

is classed as a Pitri Bandhava. Cognates related through the daughters of the family must be called Atma Bandhus. For there is no reason whatever for calling them father's Bandhus. But if the text be taken to classify and to give examples of Bandhus of each class, then the man's own paternal aunt's son would be Atma Bandhu. But his father's paternal aunt's son would be Pitri Bandhu; and in that case, it would be difficult to say under which class the sister's son, or the brother's daughter's son, or the uncle's daughter's son ought to be placed.

9. The fact is, that the texts of Vridha Satatapa declare only who the Bandhavas are. On going through the texts, it would appear that there can be only three Bandhavas or cognate brothers to the same man, *viz.*:—

The tl Bandhs of a ma himself

1. Paternal aunt's son.
2 Maternal aunt's son.
3. Maternal uncle's son.

The Pitri Bandhavas or Bandhavas of the father are Bandhus to the son; but they are not necessarily all Pitri Bandhus of the son. Of the three Pitri Bandhavas two are Pitri Bandhus of the son. But the father's paternal aunt's son though a Pitri Bandhava is not a Pitri Bandhu in relation to the son, but an Atma Bandhu.

10. According to Vijnaneshwar's definition of the term Sapinda, the relationship exists mainly between persons connected by blood. Now, connection by blood between cognates may be either—

Cog classi

1. Through mother.
2. Through father's mother.
3. Through mother's mother.
4. Through the daughters of the family.

Vijnaneshwar says that Bandhus are of three classes, namely, 1. Own Bandhus. 2. Father's Bandhus. 3. Mother's Bandhus.

From the enumeration of the Bandhavas in the text of Vridha Satatapa, and from the very meaning of terms, Atma Bandhu, Pitri Bandhu and Matri Bandhu, it appears clear that—

1. Atma Bandhus are those connected through mother.
2. Pitri ditto ditto father's mother.
3. Matri ditto ditto mother's mother.

For reasons already stated, those connected by blood through the daughters of the family are also Atma Bandhus.

11. Vijnaneshwar has classified the Bandhus in such manner as to render it possible to apply the principle of nearness of kinship, and to determine the order in which the several classes succeed. But the difficulty is solved only partially. The classes are not clearly defined in the Mitakshara; nor is there any rule laid down in it for determining the order of succession among those included in each class. It has been held by the High Court of Bengal, that the order of succession among the Bandhus of each class is to be determined on the principle of spiritual benefit. But as most of the cognates who inherit according to the Mitakshara are altogether incapable of conferring any benefit, the principle is clearly inapplicable in the case of Bandhus, even supposing that there is sufficient authority for it in the other authoritative works of the Benares school. (Ganesh Chandra Ray *v.* Nilkamal Ray, 22 W. R. 264.)

The principle of spiritual benefit has been held to be applicable to determine the order of succession among Bandhus.

But that principle is altogether inapplicable.

12. The English text-writers have not even attempted to solve the question; and their works throw no light on the subject.

13. Pandit Raj Coomar Sarvadhicari has done a great deal towards the solution of the question. But the learned Pandit has not noticed the distinction between the words Bandhu and Bandhava referred to above; and he has reconciled the supposed inconsistency of Vijnaneshwar by interpolating certain words in the text of Vridha Satatapa, so as to change its meaning altogether.

14. From what has been already stated, it will appear that the cognates called Atma Bandhus succeed first, and that they are of two classes, namely,

Atma Bandhus succeed first They are of two classes.

1. Those related through the daughters of the family.
2. Those related through the mother.

According to the principles laid down in the Mitakshara, the former are entitled to succeed before the latter. As between cognates related through the father and the mother, preference is given to those related through the father.* On the same principle it must also be allowed that the Atma Bandhus *ex parte paterna* ought to have priority over cognates *ex parte materna*.

1. Atma Bandhus in the paternal line.

2. Atma Bandhus in the maternal line.

15. Atma Bandhus who are related through the daughters of the family are of the following classes :—

Atma Bandhus in the paternal lines classified.

1. Those in relation to whom the *propositus* is Atma Bandhu *ex parte materna.*
2. Those in relation to whom the *propositus* is Pitri Bandhu.
3. Those in relation to whom the *propositus* is Matri Bandhu.

16. In relation to the daughter's son, son's daughter's son and grandson's daughter's son of himself and of his four ancestors, the *propositus* is Atma Bandhu *ex parte materna.*

17. In relation to the daughter's grandson and son's daughter's grandson of himself and of his four paternal ancestors, the *propositus* is Pitri Bandhu

18. In relation to the daughter's daughter's son and son's daughter's daughter's son of himself and of his four paternal ancestors, the *propositus* is Matri Bandhu.

19. Among Atma Bandhus *ex parte paterna* the order of succession is, therefore, as stated above. Diagram No. I at the end of this section will illustrate what is stated here as to the order of succession among Atma Bandhus *ex parte paterna.*

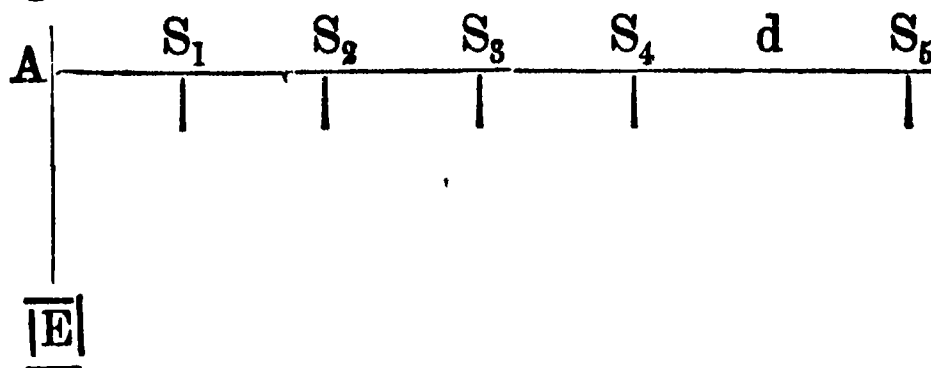
20. The order of succession among Atma Bandhus *ex parte materna* is illustrated by diagram No. 2. The Atma Bandhus *ex parte materna* are of the following classes :—

Atma Bandhus i the mater lines class fied.

1. Those in relation to whom the *propositus* is Atma Bandhu *ex parte paterna.* These are all agnate Sapindas of the maternal grandfather.
2. Those in relation to whom the *propositus* is Atma Bandhu *ex parte materna.*
3. Those in relation to whom the *propositus* is Pitri Bandhu.
4. Those in relation to whom the *propositus* is Matri Bandhu.

21. It is to be observed here that the wealth of a Sapinda is taken by his nearest Sapinda, according to the well-known text of Manu. From that text, it follows that the relation of Sapindaship must be mutual. Among agnates the relation of Sapindaship is always mutual. But among cognates, it is not so in a few cases. In order

Sapind ship mu be mutu

to determine whether any persons are heritable cognates of the *propositus* "it is necessary to see whether they are related as Sapindas to each other." (Murad Bahadoor *v.* Udai Chand, I. L. R. 6 Cal. 119.) Unless Sapindaship is mutual, one cannot be the heir of the other. The following illustration will make this clear:

A is the father of the deceased proprietor. S_1 S_2 S_3 and S_4 are the successive male descendants of A. S_5 is the daughter's son of S_4. Now S_5 being within six degrees from the father of the *propositus* he is Sapinda to the latter. But A the father of the *propositus* is in the mother's line of S_5, and as he is beyond the fifth degree commencing from S_5, he is not a Sapinda to S_5. Nor is the *propositus* Sapinda to S_5. The relation of Sapindaship is not mutual; and the one cannot be heir to the other.

The order of succession among cognates according to the Mitakshara ought it seems, to be as follows—

Ba succ They two ol

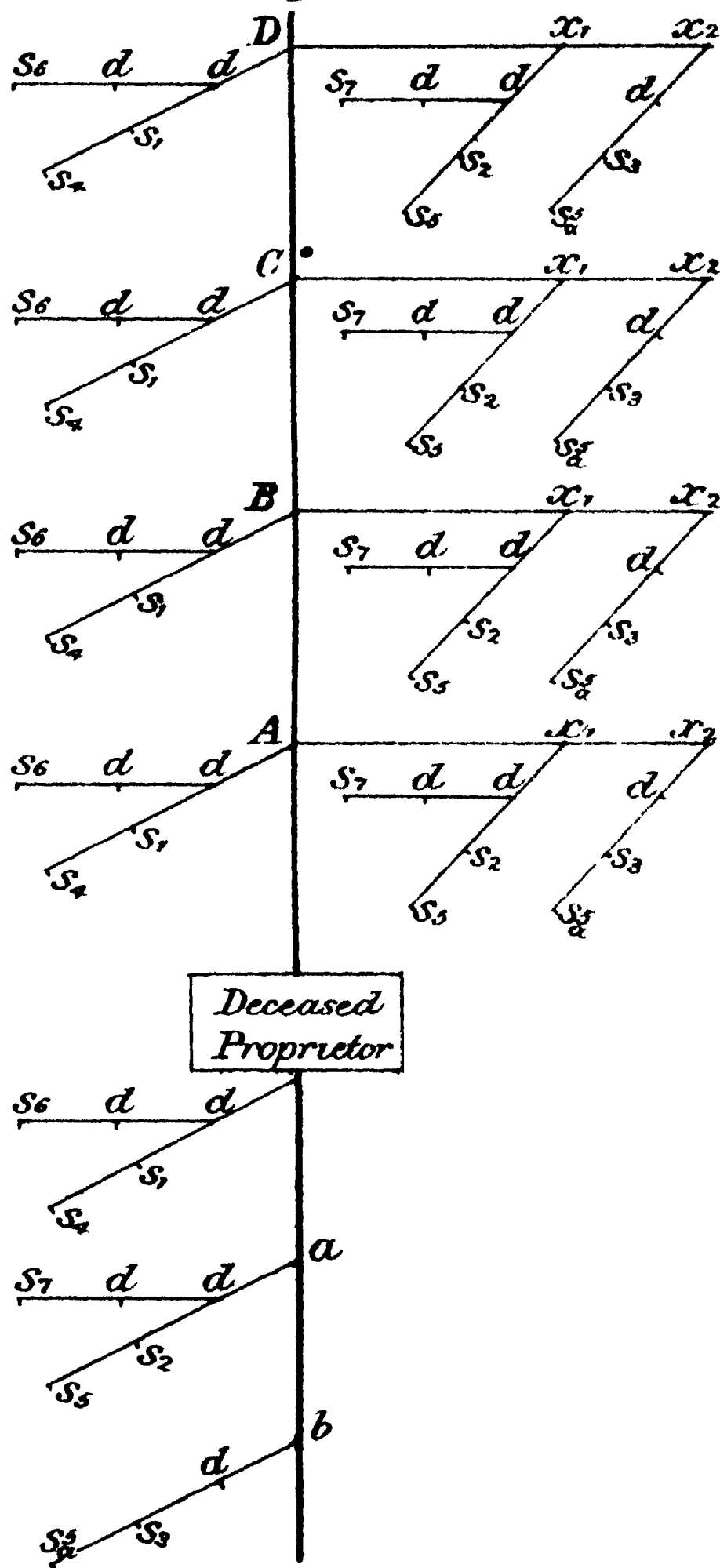
1. Atma Bandhus *exparte paterna* to whom the *propositus* is Atma Bandhu *exparte materna.*	1. Daughter's son, son's daughter's son, grandson's daughter's son of the *propositus.* 2. The same of his father. 3 The same of his grandfather. 4. The same of his great-grandfather. 5. The same of his great-great-grandfather.
2. Atma Bandhus *exparte paterna* to whom the *propositus* is Pitri Bandhu.	6. Daughter's grandson and son's daughter's grandson of the *propositus.* 7. The same of his father. 8. The same of his grandfather. 9. The same of his great-grandfather. 10. The same of his great-great-grandfather.

1. Atma Bandhus in the paternal line.

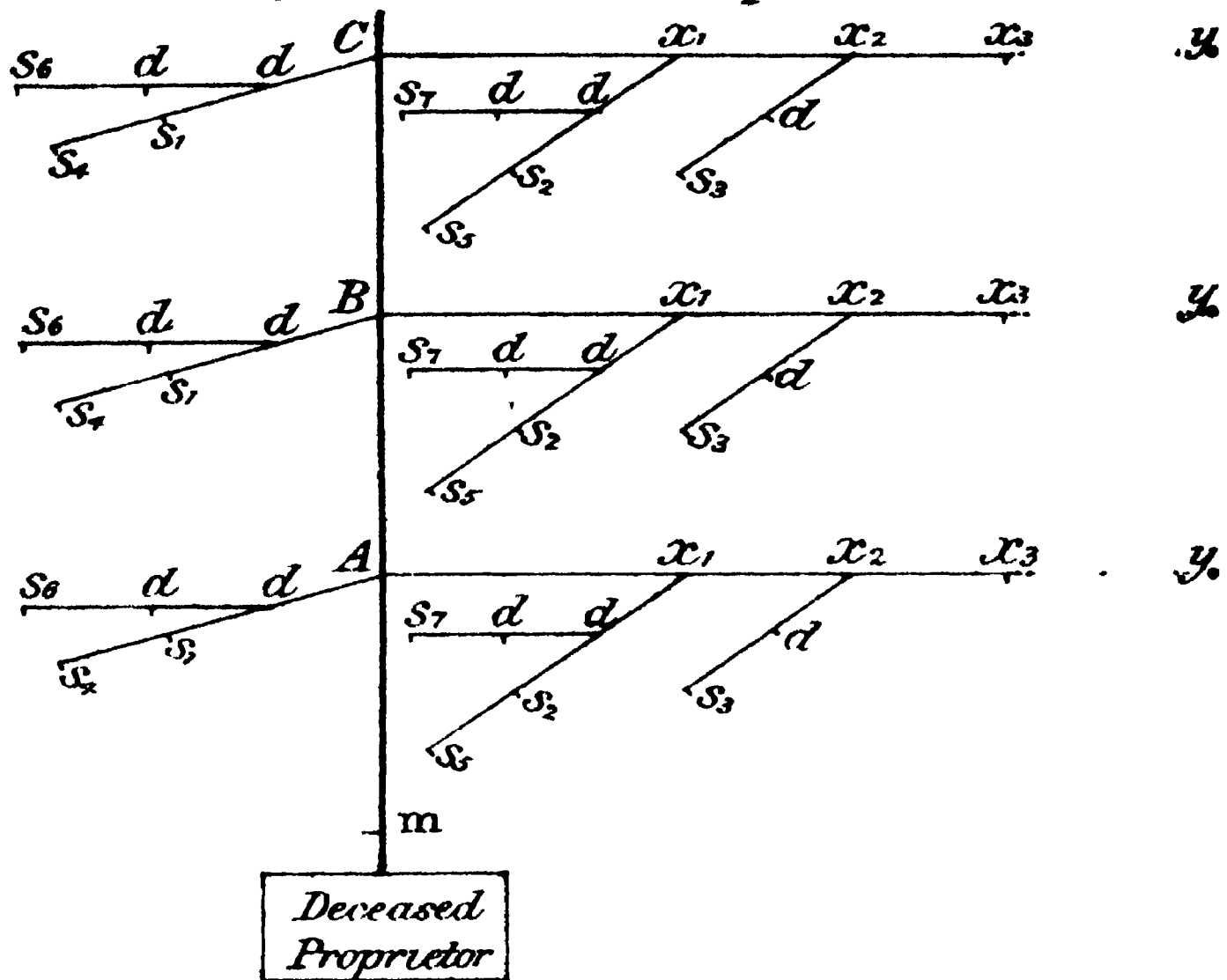
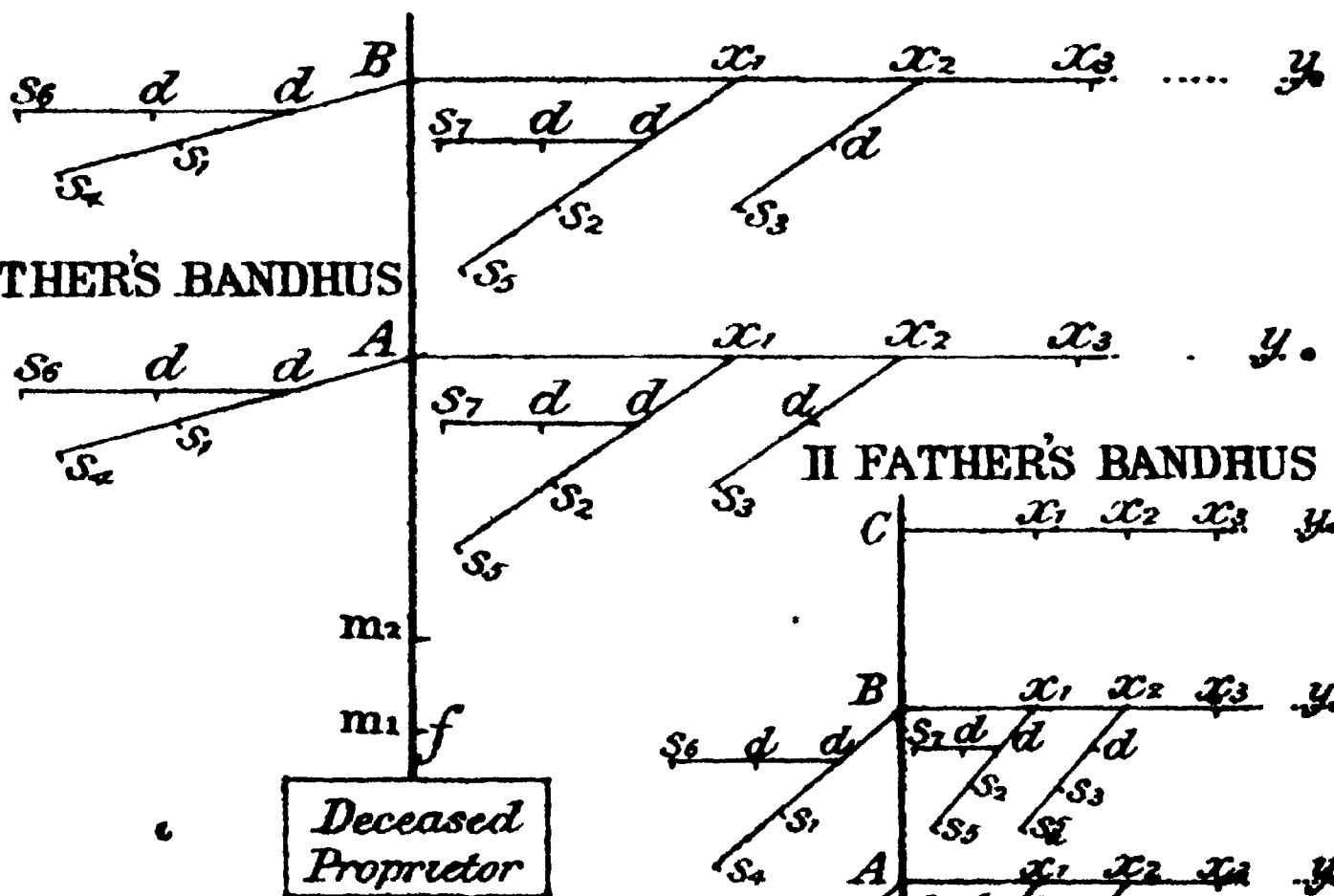
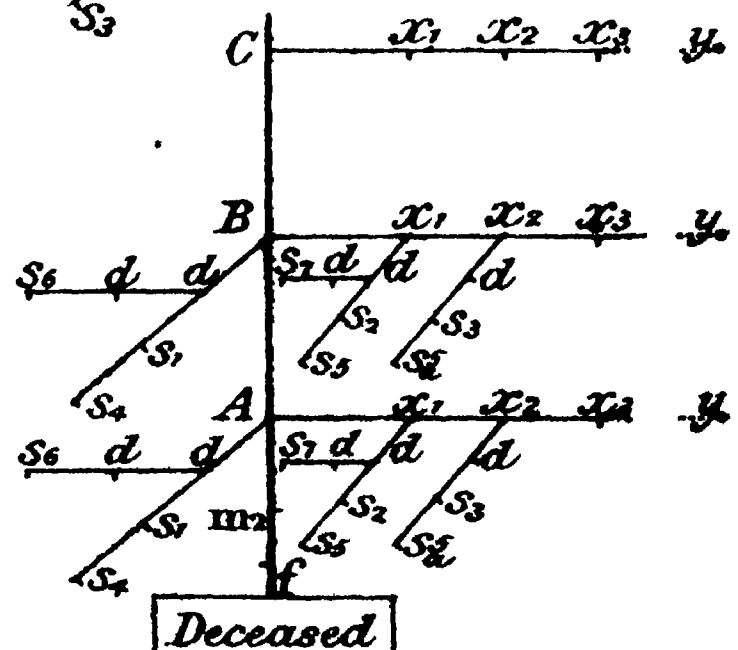
2. Atma Bandhus in the maternal line.

b mo fath that priorit

I(a) MITAKSHARA–BANDHUS.

Owner's Cognate Sapindas Exparte paternâ

N.B. For these diagrams the author is indebted to Pun-

I(b) MITAKSHARA–BANDHUS.

Owner's Cognate Sapindas Ex parte maternâ.

3. Atma Bandhus *ex parte paterna* to whom the *propositus* is Matri Bandhu.	11. Daughter's daughter's son and son's daughter's daughter's son of the *propositus*. 12. The same of his father. 13. The same of his grandfather. 14. The same of his great-grandfather. 15. The same of his great-great-grandfather.
4. Atma Bandhus *ex parte materna* to whom the *propositus* is Atma Bandhu *ex parte paterna*.	16. Son, grandson, great-grandson of the maternal grandfather. 17. The same of the maternal great-grandfather. 18. The same of the maternal great-great-grandfather. 19. The great-great-grandson of the three maternal ancestors, in order.
5. Atma Bandhus *ex parte materna* to whom the *propositus* is Atma Bandhu *ex parte materna*.	20. Daughter's son, son's daughter's son, grandson's daughter's son of the maternal grandfather. 21. The same of the maternal great-grandfather. 22. The same of the maternal great-great-grandfather.
6. Atma Bandhus *ex parte materna* to whom the *propositus* is Pitri Bandhu.	23. The daughter's grandson, and son's daughter's grandson of the maternal grandfather. 24. The same of the maternal great-grandfather. 25. The same of the maternal great-great grandfather.
7. Atma Bandhus *ex parte materna* to whom the *propositus* is Matri Bandhu.	26. The daughter's daughter's son, and son's daughter's daughter's son of the maternal grandfather. 27. The same of the maternal great-grandfather. 28. The same of the maternal great-great-grandfather.

8. Pitri Bandhus to whom the *propositus* is Atma Bandhu *ex parte paterna.*	29. The son, grandson and great-grandson of the father's maternal grandfather. 30. The same of the father's maternal great-grandfather. 31. The same of the father's maternal great-great-grandfather. 32. The great-great-grandson of the three maternal ancestors of the father, in order.
9. Pitri Bandhus to whom the *propositus* is Atma Bandhu *ex parte materna.*	33. The daughter's son, the son's daughter's son, the grandson's daughter's son of the father's maternal grandfather. 34. The same of the father's maternal great-grandfather and great-great-grandfather.
10. Pitri Bandhus to whom the *propositus* is Pitri Bandhu.	35. Daughter's grandson and son's daughter's grandson of the father's maternal grandfather. 36. The same of the father's maternal great-grandfather.
11. Pitri Bandhus to whom the *propositus* is Matri Bandhu.	37. Daughter's daughter's son and son's daughter's daughter's son of the father's maternal grandfather. 38. The same of maternal great-grandfather.
12. Matri Bandhus to whom the is Pitri Bandhu *ex parte paterna.*	39. The mother's maternal grandfather, his son, grandson, great-grandson. 40. The mother's maternal great-grandfather, his son, grandson, great-grandson. 41. The great-grandson of the mother's maternal grandfather and great-grandfather.
13. Matri Bandhus to whom the *propositus* is Atma Bandhu *ex parte materna*	42. The daughter's son, the son's daughter's son, and the grandson's daughter's son of the mother's maternal grandfather. 43. The same of the mother's maternal great-grandfather.

15. Matri Bandhus to whom the *proposi-tus* is Pitri Bandhu.	44. Daughter's grandson and son's daughter's grandson of the mother's maternal grandfather. 45. The same of the mother's maternal great-grandfather.
15. Matri Bandhus to whom the *proposi-tus* is Matri Bandhu.	46. The daughter's daughter's son and the son's daughter's daughter's son of the mother's maternal grandfather. 47. The same of the mother's maternal great-grandfather.*

SUCCESSION OF STRANGERS.

The preceptor of th Vedas succeeds in default of blood-relations.

1. On failure of Bandhus the succession devolves on pupils and fellow-students according to the text of Jagnyavalkya. But in order to reconcile it with the texts of other Shmritis, Vijnaneshwar has laid down that after blood-relations, the preceptor succeeds first, then the pupil, and then the fellow-student Acharya or preceptor is one who invests with the sacred thread, and teaches the Vedas. In these days, the family Guru generally officiates as Acharya, at the time of investiture with the thread. But the Gayatri Guru, as he is called, has very little to do with the subsequent education of the boy. The study of the Shmriti and the Mimansas has, in these days, taken the place of the Vedas. The few who read the Vedas commence their study at a later period of their lives, and their connection with the preceptor can never be so strong as to entitle the Bhattacharya of these days to inheritance.

The Tantric and Vaishnav Gurus are not entitled to claim as Acharya.

2. The Tantric and Vaishnav Gurus of these days sometimes claim the inheritance of their disciples. But, as they do not teach the Vedas, they are not certainly entitled to claim as Acharyas. In one case cited in the Vyavastha Darpan, p. 293, a Vaishnav Gossain claimed to be heir to the disciple of his father. But the claim was dismissed. By custom, however, if proved, a Guru may succeed. (Jagadanand *v.* Keshavanand, W. R. for 1864, p. 146)

* It is hardly necessary to note that in each of these 47 classes of heritable cognates, the nearer excludes the more remote.

3. The succession of the pupil and of fellow-students has become obsolete, for the same reason that has made the succession of Acharya obsolete.

On failure goes to the king except in the case of Brahmins.

4. As Sudras can never have a preceptor, pupil or fellow-student of the Vedas, their estate goes by escheat to the king on failure of blood-relations.

5. The estate of Kshatryas and Vaishyas goes to the king on failure of heirs down to the fellow-student. (Mit. chap. II, sec. VI, para. 6.)

6. According to the Shasters, the king cannot take the estate of a Brahmin, under any circumstance. On failure of heirs down to the fellow-student, the estate of a Brahmin goes to some Brahmin learned in the Vedas, and in default of a Brahmin learned in the Vedas, the estate goes to Brahmins generally. Such is the law according to the Shasters. But it has been held by the Privy Council that, on the death of a Brahmin without heirs, his estate may be taken by the king, though the king would, in such case, be under an obligation to give the same according to the direction of the Shasters. Their Lordships observed as follows :—

Collector of Masulipatam v. Venkata Narainapa.

"For the exposition of the Hindu law on the point, it is unnecessary to go back further than the Mitakshara. That treatise, the highest authority on the law of inheritance, in the part of India where the zemindaree, the subject of the suit, is situate, comprises, amongst other authorities, the passage of Manu which is principally relied upon. It is, however, from the consideration of the whole chapter of the work, and of the different authorities which are there collected, taken together, that we are most likely to arrive at a right conception of that law."

"The important passages are in articles 3, 4 and 5 of chapter II, sec. VII.

"From these it would appear that the beneficial enjoyment of a Brahmin's property ought not, on his death without heirs, to pass to the king; that it ought, in some way or another, to pass to other Brahmins. But the texts also show that it is not to pass to Brahmins generally, or even to any definite or well-ascertained class of them. The persons to take the beneficial interest are to be Brahmins having certain spiritual qualifications; they are to be pure in body and mind, and are to have read

the three Vedas. If this be the law, it seems to imply a power of selection; and a right of possession, at least intermediate, of the property in somebody. It cannot be supposed that the first Brahmin who could lay hands upon the property of a member of his caste dying without heirs was to hold it, subject perhaps to the condition of showing, that he possessed the personal qualification which the law requires.

It appears to their Lordships, that the passage quoted by Mitakshera from Nareda, in the very section which cites the prohibition of Manu, shows what the law in its utmost strictness was. That passage is—"If there be no heir of a Bráhman's wealth, on his demise it must be given to a Brahmana, otherwise the king is tainted with sin." In other words, the king is to take the property, but to take it subject to the duty, which he cannot neglect without sin, of disposing of it at his discretion amongst Brahmins of the kind contemplated in the preceding texts. (Collector of Masulipatam *v.* Cavaly Venkata Narainappah, 1 P. C. J. page 753.)

Shivaganga case.

Before concluding this chapter, it is necessary to refer to the decision of the Privy Council, in the case of Katama Natchiar *v.* Rajah of Sivaganga, commonly known as the Shiva Ganga case. In that case, it was held that there may be two courses of descent in respect of the property of the same man If a childless member of an undivided family dies leaving separate and self-acquired property, then his interest in the undivided property lapses in favour of undivided coparceners; but his separate property is taken by his widow, or other near heir living at the time. As observed in the judgment of the Privy Council, "there is coparcenariship between the different members of a united family and survivorship following upon it. There is community of interest and unity of possession between all the members of the family, and upon the death of any one of them, the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession. But the law of partition shows that as to the separately acquired property of one member of a united family, the other members of the family have neither community of interest, nor unity of possession. The foundation, therefore, of a right to take such pro-

Reunion

As to reunited coparceners the law of the Mitakshara is the same as that of the Dayabhaga, though there is considerable difference between the two great authorities as to the interpretation of the texts on the subject. The share of the reunited coparcener is not extinguished by his death; nor does it go to widow or daughter as separate property. But the same is taken by the reunited uterine brothers only if there be such. In default of such, the reunited half-brother and the separated brother of the whole blood take equal shares.

According to the Mayukha, and the decisions of the Bombay High Court, reunion can take place only between persons who originally separated. Vyvahara Mayukha, Bombay edition of 1826, page 143; Vishwanath, Gungadhar *v.* Krishnajee Ganesh, 3 Bombay H. C. Rep. p 69.

CHAPTER X.

SECTION I.

THE LAW OF INHERITANCE ACCORDING TO THE DAYABHAGA.

Right to property is extinguish by death, c gradation, and the son or other he succeeds then and n before.

1. It has been already stated that, in the Bengal School of Law, sons do not by birth acquire any right in the property of the father, and the principle of succession by survivorship is unknown in the Dayabhaga system. The male issue of a man succeeds him after his death by inheritance, and not by lapse as under the Mitakshara. When a man dies or becomes degraded, or when he enters into a religious order, his right to his property is extinguished, and his legal heirs succeed to his estate. Until the death of the father, even sons can have no legal right in the paternal wealth. The succession to the property of deceased persons goes by inheritance, and not by survivorship even in the undivided state.

Jimuta's work is a treatise on Inheritance.

It is called Dayabhaga or partition of heritage, but the title is a misnomer.

2. Though Jimutavahana calls his work Dayabhaga or Partition of Heritage, he deals with the subject in such manner, as to make partition superfluous and unnecessary. According to the Mitakshara, the shares of the members are ascertained, for the first time, when partition takes place. Until partition, the members have no shares. They have an interest in the family property. They are entitled to maintenance, while the property remains joint They are entitled to demand partition, at any time. But until partition, no one can say what share will be allotted to any coparcener, when that takes place. But, under the Dayabhaga, the shares are already ascertained; and by partition nothing more is done than the allotment of specific portions of the

partition among brothers should be equal, and because in the absence of special texts to the contrary, partition is always equal. If any of the Aurasa sons predecease the father leaving male issue, the sons of the predeceased son take his share. The partition between the uncles and the nephews is not equal; the grandsons take the share of their father, under special texts.

10. Thus the texts relating to partition are incorporated in the law of Inheritance; and as the texts which favour the theory of ownership by birth are explained away, partition has no importance whatever in the Bengal school of law. There is no survivorship or succession according to the Dayabhaga; and survivorship being impossible, according to the Dayabhaga system, partition cannot make any important change in the rights of the coparceners.

The extent to which the status of a family is affected by partition in the Bengal school.

11. In the case of succession by brothers of the whole and of the half-blood, the status of being separated or unseparated makes some difference in the rights of the claimants. But even in such a case the shares are vested at the time of the death of the last owner; and the subsequent partition or reunion can effect no change whatever in the rights of the parties.

12. Upon carefully considering the law as laid down in the Dayabhaga, it will appear that the law relating to partition has been practically repealed by it; and that the law of Inheritance as laid down in it, makes partition quite superfluous, except for the purpose of determining a legal status.

Section II.

THE PRINCIPLE OF SPIRITUAL BENEFIT.

The principle of spiritual benefit supposed to be the foundation of the Dayabhaga law.

1. It is generally held as beyond question that the principle of spiritual benefit is the sole foundation of the theory of inheritance propounded in the Dayabhaga; and that heritable right and order of succession are determinable on that principle alone, in cases governed by the Bengal School. The doctrine was laid down, for the first time, in the case of Guru Govinda Shaha *v.* Ananda Lal Ghose; and as there is a great deal in the Dayabhaga that apparently supports it, the doctrine has

been accepted, without question, by the Courts of Law and by the profession. In one of the English essays at the end of the Bengali treatise on Hindu law which I published last year, I showed for the first time, that Jimuta never seriously held the doctrine; and that as he has abandoned it finally, it is not to be accepted by his followers. Although I had never any doubt in the matter, yet, considering the weight of authority, I published my views with great diffidence, at the time. The essay on the subject has been since approved by the learned President of the Faculty of Law of the Calcutta University, and by some other distinguished lawyers in the country; and I incorporate the same with additions in this work, as I believe that the discussion will not be altogether profitless to the practical lawyer.

That is erroneous.

2. In the chapter on the Rules of Interpretation I have already stated that when several reasons are given, in successive clauses, for the same position, or when several interpretations are proposed of the same text, the reason adduced last, or the interpretation proposed last, ought to be accepted as correct, and everything else ought to be rejected as being untenable or open to objection. Hindu law books are written in the style in which a pundit would argue with an adversary or pupil. The object of the author is to establish the truth of his doctrine any how He gives a reason at first; but if he finds the same to be untenable, he gives another; and so on until the adversary or the pupil appears to be silenced altogether. Such being the case, the reason last given or the doctrine propounded last, is meant to be accepted as unexceptionable in the opinion of the author; and nothing could be more erroneous than to accept everything that is stated by the author, in any part of his work. The author must discuss the subject under his consideration as fully as possible; and in order to do so, he has to urge all that can be said in favour of his position. But he never expects that his adversary or his pupil will accept everything that he says.

When several reasons are given for the same position, in successive clauses, the one last given is to be accepted.

3. One single instance will suffice to show that what is stated in the first instance in a Hindu law book is not meant to be accepted as correct law. In chap. XI, sec. II, para. 30 of the Dayabhaga, Jimutavahana says —"It has been shown by a text before cited, (sec. I,

instance

56) that on the decease of the widow in whom the succession had vested, the legal heirs of the former owner, who would regularly inherit his property, if there were no widow in whom the succession vested, namely, the daughters and the rest succeed to the wealth. Therefore the same rule is inferred *a fortiori* in the case of the daughter and daughter's son whose pretensions are inferior to the wife's." The reason here given for the doctrine that the estate taken by daughters is similar to that taken by widows, can by no means be accepted as correct. For if the fact of the daughter's pretensions being inferior to those of the widow's be the cause of the similarity then the estate taken by the daughter's son and other remoter heirs must be equally limited. The reason first adduced being thus untenable, a second reason is given in para. 31, which is unexceptionable.

Where the reason last given is by way of additional support it is not to be accepted as correct.

4. Any number of instances of a similar nature may be cited from the Dayabhaga to show that what is stated in the first instance, or what is stated by way of additional support (साधक) in the end is not to be accepted as law for practical purposes. But the rules of interpretation to which I here refer, are so well-known among the native Pandits of the country, that it is hardly necessary to cite authorities in support of them Had the commentary of Sreekishen been translated into English, then the Judges of the superior Courts of law would have seen how important the rules in question are; and what grave mistakes have been made by ignoring them. That the rules in question have never been brought to the notice of the Bench is not to be wondered at, when it is remembered that the systematic study of the original works of Hindu law is neglected altogether; and that the works of Mr. Mayne, Cowell and Macnaghten are prescribed as text books for even native candidates for admission to the bar of the Courts of Law. The Dayabhaga, Mitakshara, &c., are no doubt difficult to master. But nothing is easier for a native than to remember or to understand the few short and simple texts on the interpretation of which the whole fabric of Hindu law is based. But instead of being required to study the original texts, the native candidates for admission to the bar are made to chew the dry bones of the law in the English text books and translations, which are not only

indigestible but are very often adulterated with foreign matter.

5. The judgment of the High Court in the case of Guru Govinda Shaha *v.* Anand Lal Ghose was delivered by the late Mr Justice Mitter. That the great lawyer of the age should have fallen into such an error is due in a great measure, to the use of English translations which are necessarily valueless.

6. It may be asked that if the doctrine of spiritual benefit is erroneous, then why does Jimutavahana or his commentators rely upon it so often? But on carefully going through the Dayabhaga, chap. XI, it will appear that Jimuta very seldom relies solely upon the principle of spiritual benefit in support of his conclusions. In order to establish the heritable right of the son, the widow, the daughter, the daughter's son, &c., Jimuta has in every case quoted express texts, and has then referred to the capacity of the heir to benefit the soul of the deceased as an additional reason, or what is called technically साधक It is not, therefore, correct to say that Jimuta relies upon the spiritual principle only, in any case.

Jimuta never relies on the spiritual theory only in support of his conclusions.

7. The question still remains—why does Jimuta rely upon the doctrine at all? The fact is, that the doctrine as elaborated by him is very ingenious, and the author is naturally very partial to it The doctrine was an open question long before Jimuta's time. In defining the term Sapinda in the Acharadhya of the Mitakshara, Vijnaneshwar says—

The reason why Jimuta refers to the spiritual theory in many parts of his work.

"The word *sapinda* is a compound word made up of *sa* and *pinda* *Sa* or *samana* means 'same' and *pinda*, 'body'. The word *sapinda*, therefore, means a person who has particles of the same body Sapinda relationship thus exists through connection of the parts of the same body. For example, there is sapinda relationship between the son and his father by reason of the connection of the parts of the son's body with those of his father's. In this way there is sapinda relationship between him and his grandfather and others by reason of the connection of his body with theirs through the father. Thus with the mother, by reason of the connection of his body with the mother's. Likewise with the maternal grandfather and other (kinsmen) through the mother. And so

even with the mother's sister and. her brother and other (maternal relatives) by reason of their connection with the same body. So also with the paternal uncles, paternal aunts, and others. So with the wife by reason of her being a part of the same body. In this way sapinda relationship mutually exists between the wives of (different) brothers (as also between them and their husband's brothers, &c). Wherever, therefore, the word sapinda occurs, it should be understood to mean those persons who are connected together directly or indirectly by parts of the same body If sapinda relationship be alleged to be founded upon the connection arising from the presentation of exequial cakes, then no such relationship is possible with relatives connected through the mother in the mother's line; nor with the sons of brothers and others. Mitakshara I, 52"

This passage evidently shows that even before Vijnaneshwar's time Sapindaship was by some defined as based on connection through the Parvana Pinda.

8. Apararka, who lived and wrote a century after says—

"That person who gives the water and the cake to any of the three paternal ancestors to whom the deceased was bound to present them, is a propinquous sapinda of the deceased; and the descendants of the person who may give the water and the cake to any of the ancestors to whom the deceased was bound to give them, are also propinquous sapindas of the deceased. Among these the uterine brother is a nearer sapinda to the deceased than any other propinquous kinsman, because he presents the water and the cake to the same ancestors to whom the deceased was bound to present them The nephew is a little more remote than the uterine brother, because the former gives a cake to his father which has no connection whatever with the deceased. The son of the nephew is more remote than the nephew himself, because the son presents two pindas—to his father and grandfather—which have no connection whatever with the deceased. Similarly, any other description of brother, his son, and his grandson Apararka, Sanskrit College MS 472."

Apararka thus got rid of the objection which Vijnaneshwar considered insuperable. Though Apararka thus made a very important step towards making the spiritual

theory acceptable, yet there is nothing said by him to show that Bandhus can succeed on the principle of spiritual benefit. In this state of things, Jimuta showed that it is possible to include the Bandhus of the maternal line among Sapindas, or persons connected through the Parvana Pinda. It was a great triumph, and it was impossible for him not to make the utmost of it.

9. If the giver of the Parvana be accepted as the greatest benefactor then, whether reliance is made upon texts or upon the spiritual principle, the result is in a great many cases, much the same; and Jimuta and his followers could see no objection towards relying on the spiritual principle by way of साधक for ordinary purposes. Modern astronomers very often make their calculations on the geocentric hypothesis, not that they have any faith in it, but because the result is, in a great many cases the same, whether the geocentric or the heliocentric hypothesis is adopted as the basis of calculation Supposing that the giver of the Parvana Pinda is the greatest of benefactors to the soul of a deceased person, the spiritual principle would, in some cases at least, lead to the same result as express texts.

Srikishen's objection against the spiritual theory.

10. Nothing, however, would be more erroneous than the position that the spiritual principle determines the right to heirship, or the order of succession. Srikishen says in his commentary on para. 33, sec. VI, chap. XI of the Dayabhaga that if the capacity to benefit the soul of the deceased person had been the cause of heritable right, then the person who gives Pinda to the deceased at the shrine of Gaya, or the person who throws his bones into the holy waters of the Ganges ought to inherit before all others. It ought to be remembered also that the Parvana Pinda is a sort of spiritual luxury—a most unnecessary one to those at least who are born again by transmigration. The most important shrads are those which end with the Sapindikarana. If the sixteen shrads ending with the Sapindikarna be not performed, then the soul of the deceased remains in the state of a ghost. If the capacity to confer spiritual benefit determined the course of inheritance, then it would go in the first instance to the eldest son or other person who performs the 16 *shrads*, and the order of succession would, in that case, be altogether different to that laid down in the Dayabhaga, and sanctioned by the sages.

Other objections.

The word Bandhu is defined in the Dhayabhaga to include only maternal relations within the limit of the Parvana Pinda. Having thus defined the terms, Jimuta places Bandhus immediately after Gotrajas. Samanodakas are placed after Bandhus in the Dayabhaga. Bandhus, according to Jimuta, being limited to maternal relations, there cannot be much incongruity in placing them before Samanodakas or distant agnates

17. According to the view of law laid dawn in the cases of Amrita Kumari *v.* Lakhi Narain and Giridharilal *v.* Govt., Vijnaneshwar admits such a large number of cognates in the list of heirs, that he could not place Samanadokas after them; and so he was obliged to place the former after all classes of agnates. But this order of succession is directly at variance with that laid down in the texts of Manu and other holy sages.

18. The order of succession among agnate and cognate Sapindas, as laid down by Vijnaneshwar, is altogether incomplete; and his followers are driven to their wits' end to complete what he has left unfinished, without deviating from his general principles. If Vijnaneshwar's definition of Sapindaship be accepted, then the task appears to be almost hopeless. This was another reason, why Jimuta proposed a new definition of the term Sapinda. According to Vijnaneshwar, the descendants of a common ancestor within seven degrees and five degrees are all Sapindas. Jimuta rejects this definition as inapplicable in the chapter on inheritance. Jimuta lays down that in matters relating to inheritance, only those persons are entitled to be called Sapindas, between whom and the deceased some connection exists through the Parvana Pinda. As Parvana Pinda is offered to the three paternal and maternal ancestors only, Sapindaship, through the Parvana Pinda, cannot exist between persons removed more than three degrees from a common-ancestor. The number being thus reduced so as to be within manageable limits, Jimuta was enabled to lay down the order of succession with due regard to symmetry and completeness.

imuta's de- ition of pinda may accepted en if the iritual eory be jected.

19. Jimuta's definition of Sapindaship follows from the very etymology of the word, and is also supported by the texts of Manu and Baudhayana cited in paras. 37 and 40 of sec. I, chap. XI of the Dayabhaga. To make the definition, and the order of succession based upon it, more

acceptable, Jimuta has very often referred to the spiritual theory by way of साधक or additional support. The additional reason must be rejected as untenable, and at the same time superfluous. The theory fails altogether. For on the one hand, heritable right is found to exist in persons who have not any capacity to benefit the soul of the deceased proprietor; and on the other hand, those persons who perform acts most beneficial to the deceased are very often excluded altogether. If capacity to benefit the soul of the deceased were the cause of heritable right, then the son-in-law would be one of the heirs to males, as they are to females; and instead of those who are connected through the Parvana Pinda which is only an unnecessary luxury from a spiritual point of view, the following persons would be heirs before all others:

Persons who ought to inherit on the spiritual theory.

1. Persons who perform the 16 *shrads* ending with the Sapindikarana.
2. The person who performs *shrad* at Gaya.
3. The person who throws the bones of the deceased in the holy waters of the Ganges.
4. The person who gives his daughter in marriage.
5. The person who takes his daughter in marriage.

20. Then again under the spiritual theory, maternal relations would not be heirs at all. According to Jimuta's definition of the term Sapinda and Bandhu, maternal relations are Sapindas and Bandhus, and are, therefore, entitled to inherit under the texts of Manu and Jagnyavalkya. Jimuta says that persons who give Pinda to the same ancestor are Sapindas. This interpretation follows from etymology of the term. But it cannot be said that a person by giving Pinda to a deceased ancestor always benefits the souls of third persons who used to give Pindas to the same ancestor in their lifetime. The deceased ancestor, who is worshipped, gives a share of the Pinda, offered to him, to his deceased agnates. But he does not give any share to cognates; and Pindas given by the cognates of a deceased person cannot benefit his deceased cognates. In fact, there cannot be the least doubt as to the maternal relations not having any capacity to benefit the soul of a deceased person Yet Jimuta admits them in the list of heirs. The fact is, that heritable right is based upon texts of law, and not upon capacity to benefit the soul of the deceased proprietor.

Maternal relations would not be heirs under the spiritual theory

21. It is true that Jimuta has attempted to show that maternal relations are capable of benefitting the soul of the deceased, through the Parvana Pinda. "Wealth" says Jimuta "can be of use to the owner either by enjoyment or by being employed in acts of religious merit. When a man is dead, enjoyment is no longer possible, and it is but proper that his wealth should be applied in acts of religious merit. During a man's lifetime, he is bound to give Pindas to his maternal ancestors. On his death, his wealth may, therefore, be taken by maternal relations who give Pindas to the same ancestors, and thus perform acts which are productive of religious merit to him." But this reasoning is directly at variance with the fundamental principles of the Dayabhaga; and it would be a great mistake to suppose that it is unexceptionable in the opinion of the founder of the Bengal school. When a man dies, his ownership in his property is extinguished. But the above reasoning is based upon the assumption that, even after death, the soul of a deceased person has a sort of *quasi* ownership in the property left by him to his heirs.

22. It may be said by an advocate of the spiritual theory that the maternal uncle and the rest give Pindas to the maternal ancestors of the deceased, and thereby benefit him by performing a duty which the deceased was bound to perform, in his lifetime. But it ought to be remembered that the duties enjoined by the Shasters, are binding only on the living, and not on the dead. Were it otherwise, a *shrad* could not be performed on the 11th day of the moon, or any other fasting day. But fasting and other acts of religious merit are enjoined only on the living. During a man's lifetime, he is bound to perform the Parvana of his paternal and maternal ancestors. But the duty ceases to be binding as soon as he dies; and if, after his death, any other person gives Pindas to the same ancestors, he does so, on his own account; and the soul of the deceased proprietor is not in the least benefitted, except in cases in which the Pinda is offered to his paternal ancestors.

23. The duty to perform the Parvana of maternal ancestors arises only when the paternal ancestors are worshipped. When a man is dead, he cannot worship his paternal ancestors with Pindas. It follows, therefore,

that after death, the obligation to worship maternal ancestors can never arise. It is, in fact, a great mistake to suppose that the maternal uncle and the rest of a deceased person can benefit his soul, by giving Pindas to his maternal ancestors. Jimuta does not put their right on that ground, but on the ground that a portion of the wealth of a deceased person is required by the Shasters to be set apart for *shrads*; and that in default of givers of enjoyable Pindas, it is but proper that the wealth should go to the givers of Pindas to the maternal ancestors. (Dayabhaga, chap. XI, sec VI, para 13.)

24. From what is stated above, it will appear that the claim of one important class of heirs, recognized by Jimuta, cannot be based upon any capacity in them to benefit the soul of the deceased. It has been also seen that persons, such as the son-in-law, who are declared by Jimuta himself to be capable of benefitting the soul of the deceased, are yet not included in the list. Then again the Parvana Pinda is only a sort of unnecessary luxury. On the spiritual principle, the performer of the 16 shrads ending with the Sapindikarana, and other persons mentioned in page 323 *ante*, have a much higher claim.

25. It thus appears that according to Jimuta's own exposition of the law, the principle of spiritual benefit does not help in the least in determining who are the heirs to a deceased person. The principle, as propounded in the Dayabhaga, is very ingenious, and as it leads to the true result in some cases (provided that the giver of the Parvana, is admitted to be the greatest of benefactors to the soul of a deceased person) Jimuta has given it great prominence throughout chap. XI of the Dayabhaga. But, as a principle, it is altogether untenable, and Jimuta and his commentators have ultimately abandoned it, and have relied on texts only (Dayabhaga, chap. XI, sec. VI, para. 33; Commentaries on the same by Achuta and Sreekishen)

The order of succession is not determined by [illegible] soul of the deceased proprietor

26. It is thus seen, that heritable right does not depend on the spiritual principle. Nor does the order of succession depend on that principle. If the theory of spiritual benefit be accepted as the test for determining the order of succession, then the givers of secondary Pindas would inherit after all the givers of primary Pindas. But according to the Dayabhaga, the father's daughter's son

inherits before grandfather and paternal uncle. It would be said that the three secondary Pindas given by the father's daughter's son, are of greater efficacy than the two primary Pindas given by the paternal uncle. But there is no authority whatever by which it can be determined whether three secondary Pindas are greater than equal to or less than two primary Pindas. There is authority for the position that primary Pindas are of greater efficacy than secondary Pindas. But whether a larger number of secondary Pindas are of greater efficacy than a smaller number of primary Pindas is a question as to which it is impossible to give any answer, one way or the other. From the order of succession laid down in the Dayabhaga, it appears that the brother's grandson, who gives only one Pinda in which the deceased participates, inherits before the father's daughter's son who gives three secondary Pindas enjoyable by the deceased. It thus appears that the person who gives a larger number of secondary pindas, does not always take before one who gives a smaller number of primary Pindas.

Order of succession determinable by texts and indications contained in texts.

27. As between givers of primary Pindas, it appears that the brother's grandson succeeds before paternal uncle. It is said that Pindas given to a nearer ancestor are of greater efficacy than those offered to more remote ancestors. But there is no authority for this position; and instead of admitting that Pindas given to nearer ancestors are of greater efficacy, it is much better to say that the descendants of a remoter line cannot succeed so long as there is an heir of the same class, in a nearer line. Where a text of law is postulated, it should contain the fewest number of words. Jimuta has indeed, in one place, said that Pindas given to a nearer ancestor are of greater efficacy than those offered to distant ancestors. But as Jimuta has himself ultimately abandoned the spiritual theory, his followers are not to accept blindly whatever he has said, in any part of his work, in support of that theory.

28 From what is stated above, it will appear that the law of inheritance, as laid down in the Dayabhaga, is based on texts and indications contained in texts. Jimuta himself admits that such is the case (Dayabhaga, chap XI, sec. VI, para. 33) and the commentators of the Dayabhaga declare the fact in unmistakeable terms. Even

if Jimuta or his commentators seriously laid down the spiritual theory, still for reasons already stated, it could not be accepted by their followers

Section III.

SAPINDA RELATIONSHIP.

1. It has been seen that, according to the Mitakshara, Sapinda relationship exists between the descendants of a common ancestor, within certain degrees. Vijnaneshwar takes the word Pinda to mean body; and, according to his interpretation of the literal meaning of the term, all are Sapindas who are descended from a common ancestor either on the mother's side or on the father's. But the denotation of the term is limited according to the Mitakshara by the following text—

सप्तमात् पञ्चमादूर्द्ध्वं मातृतः पितृतः क्रमात् ।
सपिण्डता निवर्त्तेत सर्व्ववर्णेष्वयं विधिः ॥

[After the fifth degree on the mother's side, and the seventh degree on the father's, Sapinda relationship ceases. This is the rule among all classes.]

2. This definition of Sapindaship necessarily includes a very large number of cognates under the term, and if it be accepted then it becomes exceedingly difficult to determine whether those cognates should succeed before or after Sakulyas. Jimuta, therefore, rejects Vijnaneshwar's definition of the term; and lays down that, in matters relating to inheritance, only those persons are to be considered as Sapindas, who are connected through the Parvana Pinda. If the part "Pinda" means "Parvana Pinda" then the meaning assigned to the term Sapinda by Jimuta would follow from its etymology. As an additional reason for the interpretation proposed by Jimuta, he urges that the text—

Jimuta's definition of the term Sapinda, is based in capacity to give Pindas.

अनन्तरः सपिण्डाद्यस्तस्य तस्य धनं भवेत् ।

Manu, IX, 187.

is immediately preceded by the text—

त्रयाणामुदकं कार्य्यं त्रिषु पिण्डः प्रवर्त्तते ।
चतुर्थः सम्प्रदातैषां पञ्चमो नोपपद्यते ॥

[To three must libations of water be given; to three must balls of rice be given. The fourth is the giver; the fifth has no concern]

3. The latter text shews that, in the text immediately following, the word Sapinda means persons connected through the Parvana Pinda.

4. Jimuta also quotes a text of Baudhayana which supports his view that in matters relating to inheritance the relation of Sapindaship extends over three generations in ascent and descent; and also that Sapindaship means connection through the Parvana Pinda. (Dayabhaga, chap. XI, sec. I, para. 37.)

5. If it be admitted that Sapindaship means connection through the Parvana Pinda, then the relationship can exist only between three generations in ascent and descent, on the side of the father and of the maternal grandfather. The Parvana *shrad* is one of the several kinds of Shrads celebrated in honour of deceased ancestors. The Parvana *shrad*, as its very name indicates, is celebrated on certain festival days in the year. In it the three paternal and the three maternal ancestors are worshipped together with their wives. The worshipping of the paternal ancestors is the main object. But as there is a text which enjoins that the maternal ancestors must be worshipped whenever the Pinda is given to paternal ancestors, the result is that the ancestors on both sides are worshipped in the Parvana.

The persons who are connected through the Parvana Pinda

6. As a *shrad*, the Parvana is not of much importance. The most important shrads are those which are celebrated within the year after a man's death. It is by these 16 shrads that the soul of the deceased rises from the condition of a ghost to that of a Pitri or ancestor. As Hindus believe in the transmigration of soul after death, the Parvana Pinda can benefit the ancestor only by being converted into fleshmeat, if he is born as a demon, or into hay if he is born as a cow, or into wine if he is born in an aboriginal caste. But this sort of benefit is too attenuated and imaginary to be deemed of any importance. Practically the Parvana shrads are very seldom celebrated even by the orthodox. With the exception of the Pandits of the country, few people know even that there are other kinds of *shrads* besides the 16 *preta shrads*, the anniversary *shrad*, and the *nandimukh shrads* which are celebrated on auspicious occasions such as marriage.

The Parvana is not the most important of shrads.

7. It suits, however, the purpose of Jimuta to base his definition of Sapindaship on the Parvana shrad. His theory of spiritual benefit may be rejected. But his definition of Sapindaship must be accepted by his followers. That definition follows from the very etymology of the word, and is supported indirectly by the text of Manu, and directly by the text of Baudhayana. The definition of the term Sapinda is the key to the Dayabhaga system of inheritance; and the student will do well to study carefully all that Jimuta says on the point (Dayabhaga, chap. XI, sec. I, paras. 37-42)

8. The Parvana Pinda may be given to a man directly by his—

Persons who are entitled to perform Parvana and are therefore, Sapindas.

1. Son.
2 Grandson.
3. Great-grandson.
4. Daughter's son.
5 Son's daughter's son.
6 Grandson's daughter's son.

All these are givers of the Pinda; and the deceased is the receiver. They are, therefore, all Sapindas of the deceased, being related through the Pinda.

Primary and secondary Pindas

9. The worshipping of the paternal ancestors being the main object in parvana, the pindas given to paternal ancestors are called primary pindas; while those given to maternal ancestors are called secondary pindas. The pindas given by the son, grandson and great-grandson are primary pindas; while the pindas given by the daughter's son, &c., are called secondary pindas.

Persons who are Sapinda on the ground of being receivers of Parvana Pindas

10. If the soul of a deceased person can be benefitted at all by the parvana shrad, then the only persons who can benefit him directly are those mentioned above. But as the paternal ancestors of the deceased give him a share of the pindas offered to them, they also are supposed to benefit the soul of the deceased. At all events, the paternal ancestors are sapindas to the deceased, for the same reason on which the son, grandson and great-grandson of the deceased are sapindas to him. The paternal ancestors were the receivers; and the deceased was the giver of pindas in his lifetime. They are, therefore, sapindas.

or being givers of Pindas in which the deceased participates

11. The son, grandson, great-grandson, daughter's son, &c. of the three paternal ancestors give pindas in which

the deceased participates. They are also, therefore, sapindas to the deceased.

or being givers of Pindas to persons to whom the deceased was bound to give.

12. The maternal ancestors do not give any share of the pindas offered to them. But the deceased gave pindas to them in his lifetime; and they are, therefore, sapindas to the deceased.

13. The sons, grandsons, great-grandsons, the daughter's sons, &c. of the three maternal ancestors give pindas to the same persons to whom the deceased was bound to give in his lifetime. The maternal uncle and the rest confer no benefit whatever on the soul of the deceased. Their sapindaship is based upon something like the axiom —"Things which are equal to the same thing are equal to one another."

14. From what has been stated above, it will appear that the following are sapindas according to the Dayabhaga:

Sapindas classified according to the nature of the Pinda offered by each class.

1. Givers of primary pindas to the deceased directly.	His son, grandson and great-grandson.
2. Givers of secondary pindas directly to the deceased.	His daughter's son, son's daughter's son, grandson's daughter's son.
3. Receivers of primary pindas, and givers of shares after death.	The three paternal ancestors.
4. Givers of primary pindas indirectly to the deceased.	The son, grandson and great-grandson of the three paternal ancestors.
5. Givers of secondary pindas indirectly to the deceased.	The daughter's son, son's daughter's son, and grandson's daughter's son of the three paternal ancestors.
6. Receivers of secondary pindas.	The three maternal ancestors.
7. Givers of primary pindas to the receivers of secondary pindas.	The son, grandson and great-grandson of the three maternal ancestors.
8. Givers of secondary pindas to the receivers of secondary pindas.	The daughter's son, son's daughter's son, and grandson's daughter's son of the three maternal ancestors.

By defining the term sapinda, as stated above, and by showing that maternal relations are connected through the parvana pinda, Jimuta was enabled to reconcile Manu and Apastamba with Jajnyavalkya; and to make the order of succession equitable, symmetrical and complete.

15. The daughter's grandson and certain other near relations do not come under Jimuta's definition of sapinda; and are not heirs at all. In this respect it may be said the order of succession laid down by the founder of the Bengal school is inequitable. But it ought to be borne in mind that almost all the cognates were virtually excluded under the Mitakshara. If the daughter's grandson, &c could succeed at all according to Vijnaneshwar, they could do so only as Bandhus. But as Bandhus are placed in the Mitakshara after all classes of agnates the former were practically excluded. Jimutavahana would say—"I have done all that is possible for the cognates. It is true that I have excluded a great many of those who are called Bhinna Gotra Sapindas in the Mitakshara. But in the first place, it is at least not quite certain that all the Bhinna Gotra Sapindas can succeed as heirs under the Mitakshara. Even admitting that they are all heirs according to Vijnaneshwar, still it must be obvious that they were practically excluded, being placed in the list after all agnates—sapindas and samanodakas. I have rather been too partial towards the cognates. I have placed the daughter's sons of agnate sapindas among the nearest class of heirs. I have placed the maternal relations before agnate sakulyas. I am unable to do more for the cognates consistently with the texts."

Jimuta's definition excludes a great many near cognates but on the whole does greater justice to the natural claims of cognates.

Section IV.

THE ORDER OF SUCCESSION TO THE ESTATE OF MALE PERSONS.

1. *Sons.*

According to the spiritual theory, the eldest son ought to stand first in the list of heirs. But in spite of all that is said by Jimuta in favour of the theory, he very seldom takes it as his guide in determining the order of succession. It is by express texts, and by indications contained in express texts, that Jimuta has worked out

his system. Manu says that "after the death of both parents, the brothers should divide the paternal heritage equally." (Manu IX, 104.) On account of this and similar other texts in all the Sanhitas, the sons all take equally.

There are certain texts which authorize unequal partition to a certain extent. But, like the author of the Mitakshara, Jimuta maintains that, in this age, unequal partition is illegal. (Dayabhaga, chap. III, para. 27.)

Posthumous son

A son who is in the mother's womb, at the time of the father's death, is entitled to inherit (Sreekishen on Dayabhaga, chap. I, para. 20; Raghu Nandana's Sudhitawa).

Adopted son

An adopted son takes a third share of the adoptive father's heritage, where there is an Aurasa son born after adoption. A son adopted by the widow of a deceased person takes the estate which previously vested in the widow, in the same manner as a posthumous son.

By sec. I of the Widow Marriage Act (No. XV of 1856) it is declared that the son begotton on a widow remarried under the Act should be considered as legitimate. But there is nothing in the Act on which it can be held that the son of a re-married widow should take a larger share now than he was entitled to under the Shasters, when widow marriage prevailed in the country.

Son of re-married widow.

The son of the re-married widow is included among secondary sons by the sages; and the Paunervaba cannot, therefore, take an equal share with an Aurasa under the Shasters. The Widow Marriage Act has removed all legal obstacle to the re-marriage of widows; and has declared that the issue of such marriage would be legitimate. But the Act does not expressly provide that the Paunervaba of the present day will have the same status as that of the Aurasa; and, in the absence of any express provision in the Act, it may well be contended that the Hindu law must prevail, and that the Paunervaba can take only the share of a secondary son.

2. *Grandson.*

The spiritual theory as well as express texts support the claim of the grandson to the second place in the list of heirs.

Grandsons by different fathers take the share of their

अनेकपितृकाणान्तु पितृतो भागकल्पना ।

(See Dayabhaga, chap. III, p. 23.)

Where there are sons as well as grandsons by pre-deceased sons, the grandsons take the shares of their respective fathers. This would hardly follow from the spiritual theory. (Dayabhaga, chap III, page 23)

3. *Great-grandson.*

Jimutavahana says that there are no express texts in favour of the great-grandson ; (Dayabhaga, chap. XI, sec. I, para. 35) and asserts that the right of the great-grandson is deducible from the spiritual theory only. But the fact is that the great-grandson is a sapinda, according to Jimuta's definition, and he, therefore, succeeds under the text of Manu, quite irrespective of the spiritual theory. There is also a text which expressly declares the heritable right of the great-grandson. (See the Commentary of Sreekishen with reference to para. 22 of chap. III. Dayabhaga). As the latter text is quoted in Raghu Nandana, Ratnakar and other standard works, the followers of Jimutavahana cannot but admit its authority. Whether the text of Katyana be admitted or not, the heritable right of the great-grandson follows from the text of Manu, so often quoted by Jimuta himself In para 33, sec VI, chap XI, Jimutavahana has ultimately admitted that heritable right is founded on texts, and not on the spiritual theory. His assertion in para 34, sec. I, chap. XI, must, therefore, be regarded as untenable in his own opinion.

4. *Widow.*

The order of succession to the estate of a sonless man is laid down by Jimutavahana on the basis of the texts of Jajnyavalkya and Vishnu quoted in paras 4 and 5 of sec. I, chap. XI of the Dayabhaga These texts, and the indications contained in them are the sole foundation of the law of inheritance, according to the Dayabhaga. The conclusions deduced from the texts are made to appear as supported by the spiritual theory. But that theory, taken as an independent guide, would either lead to no result at all, or to results very different from those actually arrived at in the Dayabhaga. The widow does not benefit the soul of the deceased by the *parvana*

Widow do not give Parvana Pinda

pinda. Jimuta has shewn that the widow benefits the soul of her husband in other ways. (Dayabhaga, chap. XI, sec. I, para. 44) But the very style in which Jimutavahana enumerates those benefits shows that he does not attach much importance to them. With regard to the widow and other female heirs, Jimuta has admitted, in express terms, that their heritable right is based upon express texts. (Dayabhaga, chap. XI, sec. VI, para. 11.)

The ground of her right.

The texts of Jajnyavalkya and Vishnu are in favour of the widow's right to succeed in default of male issue. But there are texts in other Shmritis which declare the widow to be entitled only to maintenance. Vijnaneshwar reconciles the conflicting texts by laying down that the widow takes the separate and self-acquired property of her husband. But if the husband dies as a member of a joint family, without leaving any separate or self-acquired property, then the widow gets only maintenance. Considering Vijnaneshwar's conception of joint-ownership, it is obvious that he could not allow the widow or daughter of a deceased member in a joint family to take his place.

Jimutavahana saw that the joint co-ownership theory of Vijnaneshwar would not allow the widow, the daughter and daughter's son to inherit, where the last owner was a member of a joint family At the very outset of his work, Jimuta has, therefore, shewn that the joint co-ownership theory is untenable. According to the distinct co-sharership theory, propounded by Jimuta, there can be nothing to prevent the widow and the rest from inheriting even where the deceased owner was a member of a joint family, at the time of his death. According to the Dayabhaga theory, the several co-sharers in an undivided family hold definite shares of the family property, even before partition. The result is, that after the death of any co-sharer, his right to his share being extinguished, there is a vacancy as to his share; and by the law of cause and effect, the widow, the daughter or other next heir living at the time, becomes the owner of that share.

In default of male issue the widow is the heir even where the deceased husband was member of a joint family.

The widow takes a qualified estate, the nature of which will be discussed in the next chapter. Where there are several widows they all take equal shares (Janoky Nath *v.* Mathura Nath I. L. R. 9 Cal. 580.)

Where there are several widows they all take equal shares.

On the death of any one widow, the surviving co-widows take her share as the nearest heiress to their

husband. On the death of the last surviving widow, the estate goes to the next heir of the husband at the time.

5. *Unmarried Daughter.*

According to the texts of Yajnyavalkya and Vishnu, the daughter succeeds after the widow. There is no distinction made in these texts between married and unmarried daughters. But in paras. 4, 5, sec. II, chap. XI, Jimuta quotes the following texts of Pârasara and Devala.

अपुत्त्रस्य मृतस्य कुमारी रिक्थं गृह्णीयात् तदभावे चोढा ।

Parasara.

अपुत्त्रिकस्य कन्या स्वा धर्म्मजा पुत्त्रवद्धरेत् ।

Devala.

On the authority of these texts, Jimuta has laid down that the unmarried daughter succeeds first, then the married daughter.

In paras. 6 and 7 of the same section, Jimuta has tried to show that the father is spiritually benefitted by the marriage of his daughter at the proper age; and that, that is the reason why preference is given to the unmarried daughter. But the duty to give a girl in marriage is as binding on the grandfather, brother, &c. as it is on the father. It is said that preference is given to the unmarried daughter on the ground that if an account of want of funds there be difficulty in getting her married, then her father's soul would be in danger of being consigned to hell. But as the grandfather is required to give the unmarried daughter of his deceased sons in marriage, it may on the same ground be said that the unmarried granddaughter is entitled to inherit as heiress to her grandfather. In fact, the same reasoning would support the right of the daughter to inherit before the widow, if not before male issue.

Ground of her right.

The fact is that the additional reason given by way of बाधक in para. 7 must be rejected as superfluous. In chap. XI, sec. VI, para. 11, Jimuta has admitted in express terms that the heritable right of female heirs is founded on special texts.

The next heirs after the death of the unmarried daughter.

After the death of the unmarried daughter, whether before or after marriage, the married daughters or other next heir of the father succeed to the estate. Dayabhaga chap. XI, sec II, para. 30. Tinoomoni *v.* Nibarun Chandra, I. L. R. 9 Cal. 154.

There is a passage in the Krama Sangraha which lays down "that if a maiden daughter in whom the succession had once vested, and who has subsequently married, should die without having borne issue, the married sister who has, and the sister who is likely to have male issue, inherit together the estate which had vested in her. It does not become the property of her husband or others, for their right is exclusively to a woman's separate property." From this Mr. MacNaghten concluded that "If one of several daughters who had, as maidens, succeeded to their father's property, die leaving sons, and sisters or sister's sons, then, according to the law of Bengal, the sons alone take the share to which their mother was entitled to the exclusion of the sisters or sister's sons." (1 W. MacN. 24). This erroneous dictum of Mr MacNaghten is the foundation of the ruling laid down on the point in Mt. Bijia Devia v Mt. Unnapoorna, (3 S D. 26) But the dictum and the ruling are directly at variance with what is stated in para 30, sec. II, chap XI of the Dayabhaga. The passage of the Krama Sangraha on which the dictum is based, is only a verbal commentary on the text of the Dayabhaga. I. L. R. 9 Cal. 154.

Mr. MacNaghten's erroneous dictum.

Jimutavahana says in the Dayabhaga that after the death of the unmarried daughter, the married daughter or other next heir of the father succeeds; and not the husband as in the case of stridhan. Now, even in respect of stridhan, the husband cannot succeed if there be a son. Sreekishen, therefore, says that if the unmarried daughter dies after inheriting without leaving male issue, the husband does not take the estate, but the married sisters or other next heir of the father take it. Sreekishen does not mean to say that if the unmarried daughter dies after inheriting, leaving male issue, then her sons take the estate in all cases. He says that if she dies without leaving male issue, still the property does not go to the husband, but to the next heirs of the father.

Nature of the estate taken by several daughters.

It has been held that on the death of one of several daughtes succeeding to the estate of their deceased father, the share of the deceased daughter goes by survivorship to the others, even though they be sonless widows at the time. (Amrita Lal Basu v. Rajani Kanta, 2 I. A. p. 113). But this is altogether at variance with what is laid down bv Jimutavahana in para. 30, sec. II, chap. XI of the

6. ***Married daughter who has son or is likely to have son.***

According to the Dayabhaga, a sonless and widowed daughter cannot inherit. In the text of Narada quoted in para. 1, sec. II, chap. XI of the Dayabhaga, it is stated that the daughter succeeds, because she gives birth to a son who is like the son of a man himself. From this Jimuta deduces that a sonless and widowed daughter cannot inherit. The exclusion is on the principle *cessante ratione cessat et ipsa lex*, and is deduced from express texts, independently of the theory of spiritual benefit.

A sonless and widowed daughter, re-married in the lifetime of the parents, inherits as heiress to her father, in default of nearer heirs, under Act XV of 1856. But if she is a widow, at the time when the succession opens, then she is excluded.

Widowed and barren daughters excluded.

7. *Daughter's sons.*

The daughter's son is not mentioned as an heir in the texts of Jajnyavalkya or Vishnu. Jimuta has based his right on the texts of Manu and Vrihaspati quoted in paras. 19 and 20 of sec. II, chap. XI of the Dayabhaga

The daughter's sons, living at the time when the succession opens, take equal shares in the maternal grandfather's property.

Daughter' sons take pe capita.

Daughter's grandson cannot inherit as heir, according to the Dayabhaga. They are not sapindas, and there is no express text in their favour.

The son's daughter's son and grandson's daughter's son of the *propositus* and of his three paternal and maternal ancestors are sapindas according to Jimuta's definition of the term; and are, therefore, entitled to inherit, under the text of Manu, quite irrespective of the spiritual theory. But there is nothing said in the Dayabhaga with regard to the son's daughter's son, &c. The Krama Sangraha, as translated in English, contains passages declaring the right of the daughter's sons of brothers, uncles and great-uncles. But, in the original manuscripts, the heritable right of these cognates is declared, not in the body of the work, but in marginal annotations. The margin annotations show that the pandits of the country were slowly recognizing the rights of those who are not expressly mentioned as heirs in any legal Code, but who are included in the term sapinda as

Son's daughter's son &c. Their heritable right.

defined by Jimuta. The succession of son's daughter's son, &c. being rare if not unknown in practise, the pundits would not at once declare that the Shastars are in their favour. But the necessary consequence of the Dayabhaga's definition of the term sapinda was to include them all under the term. If there had been any authority, the pandits would have probably excluded them altogether. But there is no authority for excluding them; and as they came under the definition of the term sapinda, they are included in the list of heirs, by marginal annotations, and not in the body of the work.

In this state of the authorities, there were conflicting decisions on the point. The question was referred in the case of Govinda Horehar *v.* Womesh Chundra Ray. (Suth. F B Ruling, p 176) to a Full Bench by which it was held that the passages in the Krama Sangraha which favour the right of the brother's daughter's son, &c. are interpolations. The fact is, that the passages are not interpolations, but marginal annotations. Whether there is any authority for their heritable right in the Dayabhaga, was not sufficiently considered in that case.

The question was again referred to a Full Bench in the case of Guru Govinda Shaha *v.* Anand Lal Ghose Mazumdar, (5 B. L R. p 25). In this case, it was finally laid down, on the theory of spiritual benefit, that the uncle's daughter's son is an heir The actual decision, in the case, is unexceptionable, though the reasons on which it is based are erroneous.

Their place in the list of heirs.

The right of the son's daughter's son, &c. to inherit being recognized, the question arises what is their precise place, in the list of heirs. The marginal annotations in the manuscripts of Krama Sangraha place the brother's daughter's son before the grandfather. But these marginal annotations are regarded as interpolations; and, on the principle of spiritual benefit, it has been held that the grandfather's great-grandson is a nearer heir than the brother's daughter's son. (Govinda Pershad *v.* Mohes Chandra, 15 B. L. R. 35.) The fact is, that the marginal annotations are not interpolations. The marginal annotations are to be found in manuscripts nearly a century old. And as Sreekishen lived in the beginning of the 18th century, it is likely that the annotations existed in the original copy written by the author

himself. The Krama Sangraha is not regularly used as a text-book by the pandits of the country. If it had been a regular text-book, then the marginal annotations could have been ascribed to the pandits and scholars of the country. But the Krama Sangraha is used by the pandits, not as a text-book, but as a valuable summary of the law of inheritance which may be referred to for the purpose of giving Vyavasthas. No pandit would think it worth his while to make a marginal annotation in the book. And as the annotations in question are to be found in most of the manuscripts, it seems highly probable that they existed in the original. At any events, the marginal annotations indicate what the current of opinion among the native pandits of the country is as to the point. They are very slow to admit the son's daughter's son, &c But granting that the son's daughter's son, &c. are heirs, their can be little doubt, in their opinion, that their precise places should be as assigned to them in the so-called interpolated passages of the Krama Sangraha.

The law of inheritance propounded in the Dayabhaga is based on texts and indications contained in texts. (Dayabhaga, chap. XI, sec. VI, pl. 33). Jimutavahana has recognized the right of the daughter's sons of the three paternal ancestors to inherit as Gotraja Sapindas, and on the principle of parity of reason he has placed the father's daughter's son and the grandfather's daughter's son before the grandfather and great-grandfather. For the same reason, it must be admitted by the followers of the Dayabhaga, that the son's daughter's sons, &c. are all entitled to inherit as Gotraja Sapindas; and that as Gotraja Sapindas, of a nearer line, they exclude the more remote ancestors and their descendants.

The case of Govind Pershad *v.* Mohesh Chandra Sarma was decided, on the principle of spiritual benefit. But if pindas offered to paternal ancestors by sons, grandsons, &c. are of greater efficacy than those offered by their daughter's son, &c., then why is it that Jimuta places the father's daughter's son before the grandfather. The fact is, that Jimuta relies on the spiritual theory, only when it suits his purpose, but not otherwise.

It has been held since that the son's daughter's sons, &c. being Sapindas, they inherit before Sakulyas or remote agnates. Digumber *v.* Moti Lal, I. L. R. 9 Cal. 563.

divided, there it is not quite certain whether they all take equally, or whether the general rule applies. The text of Dayabhaga and the commentary of Sreekishen would support either view. But considering all possible cases, the best course seems to be to limit the special rule to cases where all the coparceners are undivided. This view would be consistent with reason and practice.

Until recently, the decisions of the Bengal High Court were in accordance with the true meaning of the Dayabhaga. (Tiluck Chandra Ray *v* Ram Lukhee Dassee, 2 W. R. 41; Kylash Chandra Sircar *v.* Gooroo Charun Sircar, 3 W. R. 43; Shib Narain Bose *v.* Ram Nidhi Bose, 9 W. R. 87.) These decisions of the High Court are based upon an early case cited in 2 Macn. p 66. But all these decisions are overruled by a Full Bench, in the case of Raj Kishore Lahoory *v.* Govinda Chandra Lahoory, (I. L. R. 1 Cal. 27) in which case it has been laid down that even in respect of undivided immoveable property, the undivided brother of the whole blood has a superior right to that of the undivided brother of the half blood. The decision is based chiefly on the theory of spiritual benefit. But as Jimutavahana distinctly says that the text of Yama applies to undivided immoveables, and that all the brothers whether of the whole or half blood take such property equally, the spiritual theory certainly does not apply. "What can a text not do; nothing is too heavy for a text" is a maxim of Hindu law, the application of which to such a case is obvious In the judgment of the High Court in the Full Bench case last cited, considerable importance appears to be attached to the fact that in the tables of inheritance in the Dayakrama Sangraha and in the commentary on the Dayabhaga, Sreekishen has given preference to the brother of the whole blood. But the fact is that Sreekishen there gives only the general rules. The special rule as to undivided immoveables is not referred to in the Krama Sangraha: But the commentary of Sreekishen on the Dayabhaga distinctly shows that, in the opinion of the commentator, there is such a special rule, in respect of undivided immoveables where all the brothers, whether of the whole or of the half blood, are on the same footing as to association.

The case of Raj Kishore v. Govinda I L R 1 Cal. commented on.

As for the authority of Jagannath, it cannot outweigh that of the Dayabhaga, the Dayatatwa and the commen-

himself. The ...nen. The decisions of the High Court
a text-book ...erruled by the Full Bench were based upon
been a case which was in all probability decided on the
...thority of the Vyavastha of pandits. The fact is, that
there is, so far as I am aware, no difference of opinion on
the point among the pandits of the country. In trying
to interpret the passage in a different way, Jagannath
has clearly failed; and his authority is not sufficient to
make his erroneous interpretation acceptable.

10. *Nephews and Grand-nephews.*

The order of succession among nephews is as follows:

1. Sons of undivided and reunited uterine brothers.
2. Sons of step-brothers undivided or reunited and sons of divided uterine brothers take simultaneously.
3. Sons of step-brothers separated.

In default of nephews, grandsons of the brothers of the whole and half blood inherit in the same order.

Nephews and grand-nephews take per capita.

Brother's sons and grandsons take *per capita, i. e.*, they take equal shares, and not the shares of their father (Broja Mohan *v.* Gauri Pershad, 15 W. R. 70, Gurucharan *v* Kailash, 6 W. R. 93; Broja Kishore *v.* Sree Nath Bose, 9 W. R. 463)

11. *Father's Daughter's Son.*

The father's daughter's sons take equally, and not according to their mothers.

According to the commentators Sreekishen and Achyuta, the son of the proprietor's own sister, and the son of his half sister have an equal right of inheritance (D. K. S. chap. I, sec. X, para. 1; comment on Dayabhaga, chap. XI, sec. VI.

The brother's daughter's son and the nephew's daughter's son ought, it seems, to inherit after the father's daughter's son. The marginal annotations of the Krama Sangraha place the brother's daughter's son immediately after the father's daughter's son; and if the brother's daughter's son is at all an heir, that is his proper place. But by the decision of the Bengal High Court in the case of Govinda Persad *v.* Mohesh Chandra, 15 B. L. R. 35, it has been ruled that the brother's daughter's son and the rest cannot take before those Sapindas who are expressly named in the list of heirs in the Dayabhaga.

In default of Sapinda descendants of the father, the following are heirs:

12. Grandfather, grandmother, their sons, grand-sons, &c. in the same order.

Remote Gotraja Sapindas.

13. Great-grandfather, great-grandmother, their sons, grandsons, &c. in the same order.

14. Maternal grandfather and his sons, grandsons, &c. in the same order.

Maternal relations.

15. Maternal great-grandfather and his sons, grandsons in the same order.

16. Maternal great-great-grandfather and his sons, grandsons, &c. in the same order.

Distant agnates.

17. Sakulyas:
   1. Sakulyas in the descending line, *i. e.*, the son, grandson and great-grandson of the great-grandson of the *propositus* and of his three immediate paternal ancestors.
   2. Paternal ancestors in the 4th, 5th and 6th degrees and their Sapinda descendants.
   3. The remote descendants of the three remote paternal ancestors.

18. Samanodakas.

Strangers.

19. Preceptor of the Vedas.
20. Pupil.
21. Fellow student.

तदभावे सकुल्यः स्यादाचार्यः शिष्य एव वा

Manu IX, 187.

शिष्यः सब्रह्मचारिणः ।

Jagnyavalkya, II, 141.

22. Persons of the same Gotra, and residing in the same village, (chap. XI, sec. VI, para. 27.)

23. Persons of the same Pravara and residing in the same village—

पिण्डगोत्रर्षिसम्बन्धा रिक्थं भजेरन् ।

Gotama XXVIII, 19.

24. The duly qualified Brahmins of the village.

25. King, unless the estate belonged to a Brahmin, in which case a Brahmin residing in another village may take the estate. (D. K. S., chap. I, sec. X, para. 34.)

The order of succession, according to the Dayabhaga, is based upon the very same texts as those on which the law, on the subject, in the Mitakshara, is founded. Yet the two systems differ from each other, in some very impor-

tant points. According to the texts, the class called Sapindas inherit first all. But Vijnaneshwar defines the term in such manner as to include in it all the descendants of a common ancestor within seven degrees and five degrees. The Sapindas, according to the Mitakshara, are, therefore, of two classes, namely, agnates and cognates. The agnate Sapindas succeed first, then the agnate Samanodakas, and then the cognate Sapindas

Points of difference between the Dayabhaga and the Mitakshara as to the law of inheritance.

Jimutavahana defines the term Sapinda so as to include under it only three generations in ascent and descent on the paternal and on the maternal side. Jimutavahana's Sapindas are also of two classes, namely, the Gotraja Sapindas and the non-Gotraja Sapindas. The daughter's sons of agnates, who are connected through the Parvana Pinda, are included in the class Gotraja Sapindas, and succeed along with the agnate Sapindas. The Sapindas of the maternal grandfather's family are non-Gotraja Sapindas. They are placed after Gotraja Sapindas, but before Sakulyas and Samanodakas, and not after them as in the Mitakshara.

It is difficult to say what the order of succession is among the distant agnate Sapindas, according to the Mitakshara. If the order be as laid down in this work, then the only points of difference between the Dayabhaga and the Mitakshara as to succession of propinquous Sapindas, are, 1st, that according to the Mitakshara the mother succeeds before the father, whereas, according to the Dayabhaga, the father succeeds before the mother; 2ndly, the daughter's sons of the father, grandfather, &c, are included in the nearest class of heirs in the Dayabhaga, whereas in the Mitakshara they are included among cognate Bandhus, and inherit only in default of agnates, however remote.

As regards the succession of Bandhus, there is no similarity whatever between the two systems. According to the Dayabhaga, Bandhus can be only in the maternal grandfather's line. But, according to the Mitakshara, as interpreted by authoritative rulings, the Sapindas, not only of the maternal line but of the father's maternal line and mother's maternal line are all considered as Bandhus. The order of succession among Bandhus is not worked out in the Mitakshara. Whatever it be, there can be no similarity in this respect with the Dayabhaga.

CHAPTER XI.

SECTION I.

NATURE OF THE ESTATE TAKEN BY FEMALES IN PROPERTY INHERITED.

According to the Dayabhaga, the widow succeeds to the estate of a deceased person, even though he was a member of a joint family, at the time of his death. Under the Mitakshara law, the widow succeeds only to the self-acquired and separate property of her childless husband. In an undivided family, governed by the Mitakshara, the right of all the coparceners extend over the whole property; and when any one dies, his right being extinguished, the estate remains covered with the rights of the other coparceners. Thus, in an undivided family governed by the Mitakshara, succession goes by survivorship, and the law of Inheritance does not apply.

Under the Dayabhaga, the coparceners, in an undivided family, hold distinct though undefined shares; and on the death of any coparcener the legal heir becomes the rightful owner of the share which would otherwise be without an owner.

The Mitakshara is silent as to the nature of the estate taken by a widow in property inherited

The Mitakshara is altogether silent as to the nature of the estate which a widow or other female heir takes in property inherited. In defining the nature of Stridhan, Vijnaneshwar has laid down that property acquired by inheritance is Stridhan. But even supposing that property inherited by a widow from her husband is Stridhan, still her right to it must be held as limited by the text of Katyana, and by the very nature of it During the lifetime of the husband, the wife has a qualified estate in the property of her husband. On the death of the husband, his right is extinguished; and if there be no male issue, then the widow's qualified estate continues to exist. According to the principles of Hindu law, the same person cannot be the owner of two different estates, in the same property. [*See the comment of Sreekishen on para.* 10, *chap.*

I. of the Dayabhaga.] The widow, therefore, remains in possession of the qualified estate which as wife she had while her husband lived. The authority of Sreekishen is not binding on the followers of the Mitakshara. But, at any rate, it must be obvious from the texts that the widow or the daughter does not take an absolute estate. Katyana says :—

अपुत्राः शयनं भर्तुः पालयन्ती गुरौ स्थिता ।
भुञ्जीतामरणात् क्षान्ता दायादा ऊर्द्ध्वमाप्नुयुः ॥

[Let the childless widow preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it.]

But the question is settled by judicial decision.

Though this text is not quoted in the Mitakshara, its authority is beyond question ; and it is now settled that, even in cases governed by the Mitakshara, the widow takes a qualified estate ; and on her death, the property goes to the next heir of the husband (Musamut Thakoor Dai *v.* Rai Baluk Ram, 11 M. I. A. 139 ; Bhagwan Deen Doobey *v.* Myna Bai, 11 M. I. A. 487. Bhaskar Trimbak *v.* Mahadeb Ramji, 6 Bomb. H. C. p. 14.)

The estate taken by daughters under the Mitakshara in property inherited by them from their father.

It has been held by the High Courts of Bengal and Madras and the Privy Council that the estate, taken by a daughter, under the Mitakshara, is similar to that of a widow. (Chotay Lal *v.* Chunnoo Lal, 22 W. R. 496 ; affirmed by the Privy Council, 6 I. A 15 ; Sengamalathamal *v.* Velayanda, 3 Mad. H. C. 312 ; Muttu Vaduga Nadha Tewar *v.* Dora Singh Tewar, I. L. R. 3 Mad. 290.)

The correctness of the above decisions has been questioned by several high authorities. In fact Mr. Justice Pontifex who delivered judgment in Chotay Lal *v.* Chunnoo Lal, in the Court of first instance, had himself evident doubts as to the correctness of the judgments which he felt himself bound to follow in the case. The learned Judge said—" Though I must confess that, speaking for myself, if the case had been untouched by authority, I should have felt compelled to give a plain meaning to the plain and unqualified words of the Mitakshara, rather than explain them away, or in effect reject them by the application of principles of which after all we have only a hazy and doubtful knowledge" (22 W. R. 499). To me it seems that the decision could be justified on better

grounds than the principle *stare decisis*. As the text of Katyana has been held by the Privy Council to apply to widows, in cases govered by the Mitakshara, so it may very properly be held that the texts* relating to the nature of the estate taken by daughters control their rights, whether the family is governed by the Mitakshara or by the Dayabhaga. It is not to be supposed that the Mitakshara is an exhaustive treatise. On all matters as to which Vijnaneshwar is silent, his followers are at liberty, nay are bound, to yield to the authority of the Sanhitas. The principle has been recognized by the Privy Council in determining the nature of the estate taken by the widow under the Benares law; and, on the same principle, the texts quoted below may be taken to control the rights of the daughter in the property inherited by her from her father even in cases governed by the Benares School.

Decision of the Bombay High Court as to the daughter's right.

The High Court of Bombay has decided that the daughter takes an absolute estate which descends to her son and other heirs as Aparibhashik Stridhan (Bijay Rangam *v* Laksman, 8 Bomb. H. C. 244; Hari Bhut *v.* Damodar Bhat, I. L. R. 3 Bomb. p. 171) It does not appear that there is any direct authority in the Mayukha in support of the position that the daughter takes an absolute estate. But the authority of Nilkanta is clearly in favour of the position that the son and the rest are heirs to Aparibhasika Stridhan (Mayukha Bombay Edition of 1826, p. 159.

There is no text qualifying or limiting the right of the mother in the estate which she inherits from her son. But if the estate taken by widows and daughters be limited then, on the principle of Holakadhicarana and on the principle that a rule applicable to one case may be extended to similar cases—the right of the mother may be held to be limited also (Panchanand Ojha *v.* Lalshan Misser, 3 W. R. 140; P. Bachiraja *v.* Venkatappadu, 2 Mad. 402;)

---

* प्रेतायाः पुत्रिकायास्तु न भर्त्ता द्रव्यमर्हत्यपुत्रायाः ।

(Sankha, Likhita)

प्रेतायां पुत्रिकायान्तु न भर्त्ता द्रव्यमर्हति ।
अपुत्रायां कुमार्य्यां वा स्वसा पार्श्वं तदन्यथा ॥

(Paithinasi.)

See Dayabhaga, chap. XI, sec. II, para. 15.)

Narsappa Lingappa v. Sakharam, 6 Bomb. H. C. 215; Tuljaram Morarji v. Mathura Das, I. L. R. 5 Bomb. 662.)

According to the Bombay authorities, the wives of Gotraja Sapindas may inherit (Laloo Bhai v. Man Kuverbai, I. L. R. 2 Bomb. 395 I. L. R. 5 Bomb. p. 110. The widows of Gotraja Sapindas take a qualified estate like the widows of a man himself (Bharman Gavda v Rudrapa, I. L. R. 4 Bomb.

According to the Dayabhaga, the texts of Katyana and Mahabharat apply to all female heirs*; and the widow, the daughter, the mother &c. all take a qualified estate. They are to enjoy the estate with moderation, they are not to sell or mortgage the estate except for legal necessity. On their death the next heirs of the last owner take the estate.

The Day bhaga expressly declares t' all female heirs take qualified estate.

The widow, the daughter, the mother &c being the rightful owners of the property which vests in them by inheritance, it may be said that texts which limit their power of alienation can no more affect the validity of a sale or gift made by them, than the texts which impose limitations on the father in disposing of ancestral property. The essential characteristic of ownership is power of absolute disposition. If a person has ownership he must have power of absolute disposition; and an alienation made by such person cannot be held as invalid or void on account of texts prohibiting such alienation. "A thing cannot" as Jimuta says "be affected by a hundred texts" Ownership being a thing, its essential characteristic which is power of absolute disposition, cannot be affected by texts. On this principle, Jimutavahana maintains that a sale or gift of ancestral property by the father is valid notwithstanding prohibitory texts. And, on the same principle, it may be said that a sale or gift actually made by a female heir cannot be invalid.

An appa rent incon sistency i the Daya bhaga.

So far as the widow is concerned, the answer to the contention is, that the estate taken by her is necessarily qualified; and that the texts of Katyana and Mahabharat repeat only an established fact. As already stated, the widow as wife already had an interest or right to enjoy during the lifetime of her husband. If there be male issue, then this right is extinguished at the time of the death of the husband. But if there be no male issue, then the qualified estate of the widow continues to exist; and as the same person cannot have two different estates in the same property, the death of the husband extin-

Explar tions su gested.

guishes his right, but it does not extend or improve that of the widow. As wife she had the right to enjoy; and as widow she continues to enjoy. The text of Katyana imposes the obligation of being moderate. But as that obligation is inconsistent with the essential nature of her right, it is not legally binding. It must, therefore, be obvious that the widow has the legal right to enjoy the full interest during her lifetime. (Cossinath Das *v.* Hurro Sondery Dassee, 2 M. Dig. p. 198)

Another explanation.

The Bengal Pandits also maintain that a female can never be the absolute owner of any property which does not fall under the description of Stridhan. The very fact that her right is divested in favour of the posthumous son and the son adopted by her, shows that her right is not absolute. The fact that on her death the last male owner's heirs take the estate also points to the same conclusion. Anyhow there can be no doubt that the widow and the rest take a qualified estate in property inherited by them.

Applicable to the case of daughters

The daughter acquires her right by the law of inheritance; and unless it be taken for granted that the right which the daughter acquires by inheritance is not full ownership, but only that qualified estate which a wife has in her husband's estate, it would be difficult to show how any alienation made by her without legal necessity can be invalid or void. The texts of Paithinasi and Sankha Likhita quoted in para. 15, sec. II, chap. XI, show that after the death of the daughter the next heirs of the father take the estate. These texts, therefore, can be taken as authority for the position that the estate which the daughter takes in the property which she inherits from her father is a qualified estate, and not an estate of absolute ownership.

Katyana's text imposes several limitations and obligations on the widow, besides those which are inherent in the nature of her estate. According to the text—

Limitations and obligations imposed on the widow by Katyana's text.

1. She should observe moderation in enjoying the estate.
2. She should preserve unsullied the bed of her lord.
3. She should reside in the house of her father-in-law.

As the widow's estate necessarily includes the power of full enjoyment, the direction as to the observance of moderation is a mere moral precept which is not legally binding.

Then again as to the second condition, it is to be observed that if it is legally binding, then the widow would forfeit her right by re-marriage and unchastity. By remarriage a widow now forfeits her right in the estate of her first husband, under Act XV of 1856. It is not, therefore, necessary to enquire what the effect of Katyana's text is as to the rights of a widow who is remarried. If the widow becomes unchaste after the death of her husband, then the question arises whether she forfeits her right to her deceased husband's estate on account of the breach of the condition imposed upon her by Katayana. There were conflicting decisions on the point. But it is has been finally settled by a Full Bench of the Calcutta High Court that the estate vested in the widow cannot be divested by subsequent unchastity. (Moni Ram Kalita *v* Kery Kalitani, 13 B. L R. 1) The Judges of the High Court were not quite unanimous. The opinion of the majority prevailed. But Mr. Justice Mitter differed from the majority, and declared that, in his own opinion, the widow is only a trustee for the benefit of her husband's soul, and that she forfeits her right by subsequent unchastity. The case went on appeal to the Privy Council by whom the decision of the majority of the Full Bench has been affirmed.

How far legally binding.

Effect of remarriage

Effect of unchastity

It is sufficient for the protection of a Hindu widow's right to her husband's estate from forfeiture by reason of unchastity that such right has vested in her before her misconduct. It is not necessary for such protection that she should have acquired possession of the estate before her misconduct. (Bhawani *v* Mahtab Kuar, I. L. R. 2 All. p. 171.)

In the case of Moni Ram Kalita *v.* Kery Kalitani, the widow was not excluded from caste; and it is assumed in the judgment that, even if she had been excluded, she would not have forfeited any right of property on that account, forfeiture in such case being saved by Act XXI of 1850. The learned Judges seem to have been under the impression that degradation is the same thing as exclusion from caste. There was, therefore, no issue as to

The case Kery Kalitani v. Moni Ram commented on

whether the widow, by becoming unchaste, had become degraded. Nor was there any issue as to whether degradation leads to forfeiture after the passing of Act XXI of 1850.

I have shewn in another place* that degradation is not the same thing as exclusion from caste. Degradation is defined as:—

द्विजाति कर्म्मभ्यो हानिः परत्र चासिद्धिः तमेके नरकमिति ।

Degraded persons are generally excluded from caste; but degradation itself is something quite different. Degradation is an invisible result produced by certain causes. It is a status or condition in the man, and is in no way identical with exclusion from caste.

Such being the nature of the status called degradation,† it will appear that there is nothing in Act XXI of 1850 to prevent forfeiture on account of it. The fact is, that by leading a life of unchastity, the widow becomes degraded; and by being degraded, she forfeits her right. By penance and expiation she may recover the right which would be otherwise lost. But if she refuses to perform penance, or if she perversely continues to lead an immoral life, then the right is lost for ever. In this view, it is not necessary to discuss the precise effect of Katyana's text on the rights of an unchaste widow. By unchastity and consequent degradation, forfeiture would take place, independently of the text of Katyana.

Katyana's text requires that the widow should reside in the house of her father-in-law This restriction is for protecting her from evil temptations, and also to prevent her from taking away the property to her father's house. The object being a visible one, it has been very properly held that a widow does not forfeit her right to her husband's estate by leaving her father-in-law's house. (Khoodee Monee *v.* Tara Chand, 2 W. R. 134; Aholya Bai *v.* Luckee Devi, 6 W. R. 37; Ganga Bai *v.* Sita Ram, I. L. R. 1 All. 170.)

For practical purposes, the only limitations to which the right of the widow is subject, are—

---

* See page 232 *ante*

† It should be noted here that degradation does not lead to forfeiture where the party degraded intends and is capable of performing penance.

1. She cannot sell, encumber or convey away by gift any portion of the property inherited by her, except for legal necessity.

2. After her death, her husband's heirs succeed to the estate.

Nature of the widow's estate.

The widow's estate is not, properly speaking, a life-estate. The reversioners have no vested interest in her lifetime. In fact, until her death, it is not possible to say who the reversioner will be. For certain purposes, the widow represents the estate fully. Where a suit is brought by or against her, in respect of any matter which strikes at the root of her title to the property, a decree, fairly and properly obtained against her, binds the reversioners. (Katama Nachiar *v* Shiva Ganga, 9 M. I. A. 539; Novin Chand *v*. Guru Pershad, B. L R. Sup. 1008; Nand Kumar *v*. Radha Kuari, I. L. R. 1 All. p. 282). If the widow be dispossessed, the statute of limitation would run against the reversioner from the date of widow's dispossession.

Widow represents the estate fully.

A decree against the widow binds the reversioner, only where there has been a fair trial in the suit by or against the widow (Mohima Chandra Roy Chowdry *v*. Ram Kishen Acharya Chowdry, 15 B. L. R 159; Bramma Moyee *v*. Krista Mohun Mookerjee, I. L R 2 Cal. p. 222.)

Although the widow has a limited power of disposition over the estate which she inherits from her husband, yet as she can make alienations for necessary purposes, the whole interest passes to the purchaser, if the sale is for legal necessity. If the property held by the widow be sold in execution of a decree which was originally obtained against the husband, or if the decree be for a debt contracted by the husband, then the purchaser takes the whole interest, and not merely the qualified interest of the widow. (Maharajah Jotendra Mohun *v*. Joogul Kishore, I L. R. 7 Cal 357.)

Where the estate of a deceased person is held by his widow, a suit for a debt contracted by the deceased may be properly brought against his widow. But her position must be properly described in the plaint; and there should be a prayer that the amount sued for, may be recovered by the sale of the assets in her hand. In the execution proceedings also, the nature of her position ought to be properly described. If the decree be against

the widow personally, and not as guardian of her minor sons where there are such sons, and if only her right, title and interest be sold in execution, then the purchaser cannot take anything even though the estate vests in the widow afterwards. (Alak Monee Devi *v.* Banee Madhub Chackravarti, I. L. R 4 Cal. 677.)

Where the advertisement of sale points to a decree against the husband as that which is being enforced, it is immaterial that it states that what is being sold is the right, title and interest of the widow. (Musamut Nuzeram *v.* Moulavi Amerudin, 24 W. R. 3.)

Where the widow holds the estate of her husband, she represents it fully, even though she may have authority or permission to adopt. As the widow adopts in her own right, it is absolutely within her discretion to adopt or not. Permission or authority to adopt given by the husband cannot affect her right in the property which she takes as heiress to her husband. (Bamun Das *v.* Tarinee, 7 M. I. A; Uma Sundari *v.* Soirovini, I. L. R. 7 Cal. 288.)

Widow is not a trustee.

A widow is in no sense a trustee. She is accountable to no one; she is not bound to save the income; she fully represents the estate, and so long as she lives, no one has a vested interest in the succession. The widow cannot make any alienation without legal necessity. She cannot commit waste. But short of that she can spend the income or manage the principal in any manner she likes. (Hary Das Datta *v.* Sree Mutty Uparana, 6 M. I. A. 433; Bishwa Nath Chandra *v.* Khunta Monee Dassee, 6 B. L. R. 749 Hury Das Datta *v.* Runga Mony, Sev. 657.)

The limitations on the power of the widow to make alienations do not depend upon the existence of reversionary heirs. Where there are no such heirs, still an alienation made by a widow, without legal necessity, is void (Collector of Masulipatam *v.* Venkata Narain, 8 M. I. A. 529.)

What has been said with regard to the widow applies with regard to the daughter, mother, &c. *mutatis mutandis* at least so far as the Bengal school is concerned. According to Jimutavahana the text of Katyana applies to all female heirs; and the position of all the females is similar according to the Dayabhaga.

If, as shown above, the effect of degradation is not saved by Act XXI of 1850, then unchastity and consequent

degradation unremoved by penance would lead to forfeiture, under the Bengal school as well as under the Mitakshara. It would not in that view make any difference whether the heiress becomes unchaste before or after the succession opens

A mother guilty of unchastity is, by Hindu law, precluded from inheriting her son's property. Ramnath Talapatra *v.* Durga Sundari Devi, I. L. R. 4 Cal. 550.

It has been held by the Madras High Court that the texts which pronounce that Hindu females are debarred from inheriting by unchastity are confined in their application to the widow, as such, and do not impose a condition on the succession of the mother (Kojiyadu *v.* Lakshmi I. L. R. 5 Mad. 149).

Section II.

EXTENT OF WIDOW'S POWER TO DEAL WITH INCOME AND ACCUMULATIONS.

According to the strict letter of the texts, as interpreted by the authorities of the Bengal school, a widow can spend only so much of the current income as is necessary for her sustenance and for the support of dependants and for indispensable acts of religious duty. But, from the very nature of her right, the widow is entitled to enjoy the income. At any rate, it is now settled that a widow has absolute power to deal with the income as she likes. (Casy Nath Bysak *v.* Hara Sundary Dassee, 2 M. Dig. 198)

Savings and accumulations part of estate.

If, instead of spending the whole income, the widow chooses to save a part, and to invest the same in land or property, the question arises, what her power is with respect to such savings, or with respect to the property purchased out of the savings In the case of Chowdry Bhola Nath *v.* Bhagvati (7 B. L. R. 93) the High Court of Bengal laid down that property purchased by a Hindu widow out of the income of her husband's estate is an increment to the estate, is inalienable by her, and on her death goes to the husband's heirs, and not to the heirs of Stridhan. To that extent the judgment was affirmed by the Privy Council (2 I. A. 256). It was, however,

suggested by the Privy Council that perhaps purchases made by a widow from the income of her husband's estate are not necessarily accretions to it unless she intended them to be such.

In the case of Sreemutty Padma Monee *v.* Dwarka Nath Biswas (25 W. R 335) the distinction between current income and accumulations was referred to with approval. But the decision itself was not based on the distinction. Mr. Justice Jackson who delivered judgment in the case, observed (p. 340): "There are certainly no materials for a determination whether she (the widow) bought it out of current income or accumulations. But we are inclined to think this enquiry unimportant, and to base our decision, if necessary, on a broader and clearer ground, *viz.*, that Rashmony having purchased this land (if she did so) with moneys derived from the income of her husband's estate then lying in her hands, was competent afterwards to alienate her right and interest in whole or in part, to reconvert them into money, and spend it if she chose (25 W. R. 340).

In the case of Hunsbutty Kerain *v.* Ishri Datta Koer (I. L. R. 5 Cal. p. 523) Mr. Justice Ainslie in delivering judgment took exception to the distinction between current income and accumulations. The learned Judge observed—"It seems to me that, if it is within a Hindu widow's power to dispose of the surplus profits from her husband's estate remaining after due provision has been made for the duties which the widow is bound to perform, it must be equally within her power to do so whether she does it at once as the profits reach her, or whether she allows them to accumulate.

Results of the distinction between current income and accumulations.

"Suppose that she has a surplus income of Rs. 1000 per annum, and wishes to buy a property of the value of Rs. 5000 to give to some one, other than a reversionary heir of her husband. If she can dispose of the surplus at once, she can, by giving it for five successive years, enable the person intended to be benefitted to buy the property. I can conceive no reason for not allowing her to accumulate the necessary funds to buy it herself, and give it away. Indeed, in this latter case, the reversioner has an advantage, for if the widow happens to die without disposing of the fund, or that into which it may be converted, it will come to him.

"If the widow can make effective arrangements for carrying out her wishes, it is useless to say she cannot do so directly; it is clearly opposed to public policy to force her to adopt a circuitous course instead of a simple straightforward one, and, as already observed, it is not in the interest of the next taker of the husband's estate to do so.

"If a distinction is to be drawn between current income and accumulations, where is the line to be drawn? When does the surplus cease to be part of the current income? There is no rule requiring a widow to make up her accounts at stated intervals, and carry unexpended balances to the credit of the husband's estate. How are we to say that up to 31st December she is free to spend the money in hand as she chooses, but on the 1st January it lapses like an unexpended assignment of public money at the close of the financial year. Who is to audit her accounts? If she is accountable to the heirs of the husband not only for the safe custody of his estate, but for the expenditure of the income, then I can understand that she is not free to give away immoveable estates purchased out of the surplus. In speaking of surplus income, I assume that it is a *bonâ fide* surplus, and that the expenditure of it will not involve any improper alienation of the *corpus* to meet charges which a widow is required to provide for" (I. L. R 5 Cal. pp. 523, 524.)

In the view which I have taken of the true cause of the limitations on the widow's right, she has power to enjoy the whole income, notwithstanding the duty of moderation enjoined by Katyana. If the view which I have taken be correct, then the widow has as much power over current income as she has over accumulations; and the embarrassing questions as to widow's power over surplus income and accumulations do not arise. See Dayabhaga, chap. XI, sec. I, para. 27.

The distinction is unnecessary.

It has been held that, where the widow is kept out of possession of her husband's estate for some time after the husband's death, and the property afterwards comes into her hands with the accumulated income, then the widow has not greater power over the increment than she has over the parent estate. (Grose *v.* Amrita Moyee, 4 B. L. R. O C. p. 41; Sreemutty Rabutty *v.* Shib Chandra Mullik, 6 M. I. A. p. 35.)

Whatever may be the power of the widow with regard to the savings and accumulations, it is settled that the savings are not to be regarded as Stridhan. If, at the time of the widow's death, there be savings undisposed of " these would form part of the estate, and go with that estate to the next heir of her husband. (Chandra Bali Devi *v.* Brody, 9 W R. 584. Ananda Chandra *v.* Nilmony Jonardan, I. L. R. 9 Cal. 758.)

Section III

THE EXTENT OF A WIDOW'S POWER OF ALIENATION.

As regards cases governed by the Bengal or the Benares school of law, it is now settled that the widow's power of disposition is limited in respect of moveables as well as immoveables. But in the Mithila and in Southern and Western India, the widow has absolute power over moveables. Vivada Chintamony, 261-263; Siee Narain Roy *v.* Bhya Jha, 2 S. D. 23; Doorga Daye *v* Poran Dye, 5 W. R. 141. Madras: Madhaviya, § 44; Ramasashien *v* Akylandammal, Mad. Dec. of 1849; Coppa Jaseyer *v.* Sashappien. Ib. 1858, 220; Bombay Vyavahahara Mayakha, chap. IV, 8, § 3; Bechar Bhugwan *v.* Bai Luckee, 1 Bomb. 56; Bhaskar Trimbak *v* Mahadeb Ramji, 6 Bomb. 0, C. 13.

Power of widow as to moveables absolute in Mithila and Southern India.

A sale by the widow, without any legal necessity, is valid to the extent of her life interest (Govinda Mony *v.* Sham Lal Bysak, B. L. R. Sup Vol. 48; Ram Chandra *v.* Bhim Row, I. L. R. 1 Bomb. 577; Prag Das *v.* Harikishen, I. L. R 1 All. 503)

Sale by widow without necessity valid for her life.

Jimutavahana says that, if otherwise unable to maintain herself, the widow may mortgage or sell the estate which she inherits from her husband (Dayabhaga, chap. XI, sec. I, para. 62)

Jimuta also says that for the performance of the *shrad* of her husband and for other similar purposes, she may alienate the estate by gift or in any other manner, (*Ib.* para. 61.)

What constitutes necessity.

For the marriage of daughters, the widow is enjoined to give a fourth part of the estate, (*Ib.* para. 66.)

As to what constitutes legal necessity, the following

cases may be referred to: (Hara Mohun *v.* Sree Mutty Alakmony, 1 W. R. 252; Mahomed Ushruff *v.* Brojeshuree, 11 B. L R. 118; Mutee Ram Koer *v.* Gopal Sahoo, 11 B. L. R. 416; Chowdry Junmejoy *v.* Russomoyee, 11 B. L. R. p. 418.)

The primary religious purpose which a widow is bound to carry out anyhow, is the performance of the funeral obsequies of her husband, and of all the ceremonies incidental to those obsequies. They are absolute necessities. There are other religious benefits which are more of the nature of spiritual luxuries, and which would not justify the sale or gift of any portion of the *corpus*. Pilgrimage to Gaya is an absolute necessity. But pilgrimage to other holy places would not justify an alienation. The widow would be justified in raising any how the necessary funds for throwing the bones of her deceased husband in the holy waters of the Ganges. The widow may also any how raise money in order to defray the expenses of ceremonies for other deceased members of the family, such as her husband's mother, provided they were ceremonies which he was bound to perform in his lifetime. It makes no difference that the ceremonies for which the outlay is incurred would be actually performed by some other member of the family. (Chowdry Junmejoy *v* Russomoyee, 11 B. L R 418). For the marriage of daughters and granddaughters, the widow may lawfully contract debts which would be recoverable from the estate, (Ram Coomar *v.* Ichamoyee, I. L. R. 6 Cal. 36)

For religious necessity.

It has been held that a daughter is not authorized to charge the family property in order to defray the expense of her mother's *sradha*. (Raj Chandra *v.* Shisho Ram, 7 W. R. 146.)

The widow may spend the income in building temples, digging tanks, and other pious acts. But, for such purposes, she cannot alienate the family property. Runjeeb Ram *v.* Mahomed Waris, 21 W. R 49.

The widow may sell or mortgage the property inherited by her, in order to pay the debts of her deceased husband. (Chetty Colum Comora *v.* Rungaswamy, 8 M. I. A 319; Goluk Chander *v* Mahomed Rahim, 9 W. R. 316). It has, however, been held that where the debts are already barred the widow cannot burthen or dispose of the estate for their discharge. (MelGirappa *v.* Shivappa, 6 Bom. 270; See Ram Chandra *v.* Nunkoo, 14 W. R. 147.)

To pay the debts of her deceased husband.

For the protection of the estate.

For the protection of the estate as, for instance, payment of Government Revenue, or the necessary repair of buildings, a widow may sell a portion of the estate, or may mortgage the whole of it. Jimuta says nothing on the point. But the widow being the owner, for the time being, her right in this respect cannot be less than that of a manager of an infant. (Kameshwar Pershad *v* Run Bahadur, I L. R. 6 Cal. 843) A widow may borrow money on the estate for effectual cultivation, Koer Odey Sing *v.* Phool Chand, 5 N. W. P. 197.

The widow is not responsible for want of skill in managing the estate.

The widow is not responsible to any one for the proper management of the estate. If the necessity for raising funds by loan or sale arises in consequence of previous mismanagement still the sale or mortgage would not be invalid on that account. According to the ruling laid down in Hanooman Pershad Pandey's case, if there is an actually existing necessity for an advance of money, the circumstance that the necessity is brought about by previous mismanagement does not vitiate the loan, unless the lender has himself been a party to the misconduct which has produced the danger. Of course, it will be necessary for the purchaser to show that there was an actual pressure, and one which the heiress had no funds to meet. (Sree Nath Roy *v.* Rutten Mala Chowdrain, S. D of 1859, 421; Lalla Byjnath *v.* Bissen Beharee, 19 W. R. 80; Mata Pershad *v.* Bhagiruttee, 2 N. W. P. 78.)

Mere recital in the deed not sufficient to prove necessity.

Mere recital in a deed as to existence of a legal necessity would not suffice to render a sale or mortgage by the widow valid, in the absence of specific proof (Raj Luckee *v.* Gocool Chandra Chowdry, 13 M. I. A. 209.)

Widow does not forfeit her right by wasting

If the widow, by her mismanagement, endanger the estate, the reversioners may sue for injunction on the widow, or for appointment of receiver. (Nunda Lal Sett *v.* Bolakee Bibee, S. D of 1854, 351; Gouri Kant *v.* Bhogobuti, S. D. of 1858) A widow does not forfeit her right by mismanagement or waste. The reversioners may be appointed by Court to act as receivers during the lifetime of the widow. But the widow would be entitled to the whole income of the estate.

Section IV.

ALIENATION WITH THE CONSENT OF THE NEXT HEIR.

There is some conflict of authority as to the validity of an alienation made by a widow with the consent of the next heir. But the latest rulings* of the Bengal High Court are in favour of the proposition that such alienation is valid, whether made in favour of a stranger, or in favour of the reversioner himself. The reversioners have not, during the widow's life, "a vested remainder" according to the language of English law, "but merely a contingent one." The contingent right cannot be sold in execution, (Act XIV of 1882, sec. 266, clause (K); Pranputty Koer v Lalla Futteh Bahadoor Sing, 2 Hay, 608. Shama Soonderee v. Jumoona, 24 W. R. 86). In fact, the reversioners during the lifetime of the widow have no right at all. They have only an expectation. If an alienation is made for legal necessity, the consent of the reversioner is not required. Where an alienation is made by a widow, without legal necessity, the consent of the next heir can give validity to the transaction, not on the ground that the widow and the reversioner possess the entire bundle of rights in respect of the property, but on the ground that the consent is evidence of necessity or that the reversioner being the protector of the widow according to the Shasters, the consent of the protector would supply the widow's deficiency of power. Where the alienation is made in favour of the reversioner, it may be looked upon in the light of a relinquishment.

Validity of alienations made with the consent of the next heir.

In Gunga Pershad v. Shumbhoo Nath, (22 W. R. 393), the widow and daughter of the last owner made a gift of the property to the daughter's sons. The gift was held to amount to reliquishment; and the daughter's sons were reckoned as absolute owners, even during the lifetime of their mother and grandmother.

Conflicting rulings.

In Raj Bullub Sen v. Omesh Chandra Rooj (5 I. L. R.

---

* Shama Sundari v Surat Chandra, 8 W R 500, Gunga Pershad Kur v. Shumbhoo Nath Burman, 22 W R 393, Raj Bullub Sen v Omesh Chandra Rooj, I L R 5 Cal p 44, Nofer Das Roy v Madhu Soonderi Barmanya, I L. R. 5 Cal. 732.

Cal. 44), the entire property in dispute had originally be longed to one Ram Krishna Sen, who died leaving two sons, Huri Pershad and Bipra Charan. Huri Pershad died leaving a son Dwarka Nath Sen, who died, previous to 1263 without issue, leaving a widow Pearimoni from whom the plaintiff claimed. Bipra Charan died leaving four sons, of whom one only, Bessessur, who died in 1277, was alive in 1263 the date of gift to the plaintiff. Of the six defendants, four were sons of Bessessur, and the other two were included in the suit, as representing two other sons of Bipra Charan.

The defendants contended, that their rights as heirs of Dwarka Nath would not be affected or concluded by any act of Bissessur Sen, as it is not till the death of a widow that any one individual can be said to be the reversionary heir of her husband When Pearimoni died, Bissessur was already dead, and they claimed not through, or as heirs of Bissessur, but in their own right as the heirs of Dwarka Nath, and their right had its origin immediately upon the death of Pearimoni, and not before. The Lower Courts gave decrees in favour of the plaintiff; and their decrees were affirmed by the High Court. Mr. Justice Jackson, in delivering judgment, observed: "I would hold the defendants to be concluded, not upon the ground that they are bound by the act or consent of the father, through whom they say, they do not claim, but upon this ground, that the act of the widow, sanctioned by the concurrence of the then next heir and reversioner, was in itself a valid ground." (I. L. R. 5 Cal. p. 49.)

Consent of a relative who is not the next heir is not sufficient.

The consent of one who is not the next heir, at the time of the transaction, is not sufficient to render it valid as against one who was not a consenting party to it. In the case of Raj Luckee Devi *v.* Gokool Chandra Chowdry the widows of a person named Gooroo Pershad Sarma executed a deed of sale of certain properties which belonged to the said Gooroo Pershad, and after his death to his sons.

The widows of Gooroo Pershad took the property as mother of his sons. The deed of sale executed by the widow was attested by one Juggut Ram who was a distant relation of the family, but was not the next heir. With regard to the effect of the attestation by Jaggut Ram, the following observations were made in the judgment of the Privy Council:

"Their Lordships cannot affirm the proposition, that the mere attestation of such an instrument by a relation necessarily imports concurrence. It might, no doubt, be shown by other evidence that when he became an attesting witness, he fully understood what the transaction was, and that he was a concurring party to it, but from the mere subscription of his name that inference does not necessarily arise. Considering who Jagut Ram was, and what the circumstances of this family were, their Lordships are further of opinion, that his concurrence would not in this case, be sufficient to set up the deed. In the first place, it is not proved, though on the other hand it is certainly not disproved, that at the date of the execution of this deed, which had been executed before the adoption of the plaintiff (the actual next heir) took place, Jagut Ram was the next heir in reversion. He was unquestionably a very distant relation, and although he appears to have taken a considerable part in the management of this family, and even in the adoption of the plaintiff, he is not proved to have been the next heir. On the other hand, the very fact of his connection with the family leads to the presumption that he knew that the present appellant had the power given to her by her husband to adopt a child, and that, therefore, his interest, even if it existed, as next reversioner, was, in all probability, likely to be defeated. Therefore, if his concurrence were proved, it would not amount to such a concurrence by the husband's kindred as, in the opinion of their Lordships, would have defeated the plaintiff's claim. (2 P C J. p. 521.)

The surrender of her estate by a Hindu widow or mother to persons who at that time are unquestionably the heirs by Hindu law of the person from whom she has inherited it, vests in those persons the inheritance which they would take, if she at that time were to die, (Naferdass Roy *v.* Madhu Sunderi, I. L. R 5 Cal. p. 732). There may, however, be cases in which even the consent of the next heir would not give validity to an alienation by a widow which is otherwise invalid. Vide observations of the Privy Council in the concluding part of the above extract.

SECTION V.

REMEDIES AGAINST ALIENATIONS—ADOPTION AND WASTE BY WIDOW.

Who can sue.

Although during the lifetime of a female heir the reversioners cannot have a vested interest, it is now settled that the nearest reversioner can sue to have alienations made by the widow declared void, or to restrain waste. (Thakoorani Sahiba *v.* Mohun Lal, 11 M I. A. 386; Govinda Moni *v* Sham Lal, B. L. R. Sup. 43; Lala Chutter Narain *v* Wooma Koonwary, 8 W. R. 273; Bihary Lal *v.* Modholal, 21 W. R 430; Kamiksha Pershad Roy *v.* Jogadamba, 5 B. L. R. 508; Chottoo Misser *v.* Jemma Misser, I. L. R. 6 Cal. 198)

If the next heir is a female, and she colludes with the widow, then one whose title is inferior only to that of the next heir may sue to have the sale or gift by widow set aside. (Kooer Golab Sing *v.* Rao Kurun Sing, 14 M. I. A. p. 176; Gauri Datta *v.* Gur Shahai, I L. R. 2 All. 41.)

A suit against the widow is not open indiscriminately to every one in the line of succession The nearest heir is the proper person to sue Remote heirs must assign a sufficient reason for their claim to sue. (Rani Anand Koer *v.* The Court of Wards, I L. R. 6 Cal 764; Siva Das *v.* Gur Sahai, I. L. R. 3 All 362; Roghu Nath *v* Thakuri, I. L. R. 4 All. p. 16)

An assignee of a reversioner cannot sue to set aside an alienation by a widow. (Raicharan Pal *v* Pearimoni, 8 B. L R. 70.)

If the widow in possession of her deceased husband's estate transfers her interest in favour of the next heir, the latter can question her acts, and have alienation made by her without necessity set aside. Indar Kuar *v.* Lalta Pershad, I L. R 4 All. 532.

Remedies against waste by widow.

If the female heir in possession commits waste, the reversioner may sue for injunction to restrain her from diminishing the value of the property. (Hory Das Datta *v.* Ranga Mony, Sev. 657.) In a very gross case, she may even be deprived of the management of the estate, and a receiver appointed, not upon the ground that her acts operate as a complete forfeiture which lets in the next

heirs, but upon the ground, that she cannot be trusted to deal with the estate in a manner consistent with her limited rights (Nanda Lall Sett *v.* Balakee Bibee, S D. of 1854, 351; Gaurikant *v.* Bhagobutty Dassee, S. D. of 1858, 1103). In such a case, the next heirs may be, but need not necessarily be appointed the receivers. (Goluk Mony *v* Kishen Pershad, S D. of 1859). Whoever be appointed receiver, the widow is entitled to the whole annual income. (Nanda Lal *v.* Bolakee; Shama Soonderi *v.* Jumoona Chowdrain, 24 W. R. 86.)

The reversioners are entitled to restrain waste by persons holding under the widow. (Govinda Moni *v.* Sham Lal, B. L R. Sup) In a suit by a reversioner against the female heiress in possession, for restraining her from committing waste, there must be allegation of specific acts of waste, mismanagement or misconduct. Unless such allegations are made and proved, no order can be made by anticipation as to the mode in which she is to use or invest the property (Hary Das Datta *v* Uparna, 6 M. I. A 433; Bindoo Bashinee *v* Bolie Chand, 1 W. R. 125; Grose *v.* Amrita Moyee, 4 B. L. R 1.)

A widow cannot be compelled without proof of waste, to give security for the value received by her of lands belonging to her husband's estate taken by a Railway Company. Bindoo Boshinee *v* Bolie Chand, 1 W. R. 125.

Suit against a trespasser.

If the widow is dispossessed by a third party, then the reversioner may sue the widow and the trespasser for restoration of the property to the proper custody. (Radha Mohun *v* Ram Das, 21 W. R. 86.)

Against permissive occupant.

The mere fact that strangers are affecting to deal with the property as their own, without actual dispossession of the intermediate estate, or waste, or injury to it, gives no right of action against them to the reversioner. (Suraj Bansi Kunwar *v* Mahiput Sing, 7 B. L R. 669.)

Remedies against improper alienation.

If the female heiress in possession makes a sale or gift without any legal necessity, then the reversioner may sue to have the alienation declared void, except for the life of the female. Such suit may be brought at any time within 12 years from the date of the alienation, (Act XV of 1877, Sched. II, Art 125). After the death of the female, the reversioner may sue to recover possession, at any time within 12 years from the date of the widow's death. (*Ib.* Art 141.)

A suit for declaration of title as next heir is not maintainable, for until the death of the widow it is not possible to know who will be the next heir, (Chotto *v.* Jemma, I. L. R. 6 Cal. 198).

A suit for restraining future alienations, is not maintainable, because the validity of each alienation depends upon the circumstances under which it is made, and cannot be decided upon beforehand. (Pran Paty Koonwar *v.* Pooran Koonwar, S. D. of 1856.)

A suit for declaring an alienation or adoption by widow is not entertained unless it appears that lapse of time will render it more difficult for the next heir to establish his right when the succession opens, Sree Narain Mitter *v.* Sreemutty Krishna, 11 B. L. R. 171; Behari Lal *v.* Modho Lal, 13 B. L. R 222.

For setting aside an adoption by widow.

Under Act XV of 1877, Art 118 a reversioner may sue to obtain a declaration that an alleged adoption is invalid, at any time within six years from the date when the alleged adoption becomes known to the plaintiff If instead of bringing a suit for setting aside the adoption, the reversioner sues, on the death of the widow, to recover the property, then it seems that he would have 12 years from the date of the widow's death under Art 141.

Burden of proof as to necessity.

In a suit for setting aside a sale or gift by a female heiress, the burthen of proving that the sale is for a necessary purpose is on the alienee. "In transactions such as alienation by widow of her estate of inheritance derived from her husband, any creditor seeking to enforce a charge on such estate is bound at least to show the nature of the transaction, and to show that in advancing money he gave credit, on reasonable grounds, to an assertion that the money was wanted for one of the recognized necessities. The principle is, that the lender, although he is not bound to see to the application of the money, and does not lose his rights, if, upon *bonâ fide* inquiry, he has been deceived as to the existence of the necessity which he had reasonable grounds for supposing to exist, still is under an obligation to do certain things. These are to inquire into the necessity for the loan and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the borrower is acting in good faith for the benefit of the estate." (Kameshwar Pershad *v.* Run Bahadoor Sing, I. L. R. 6 Cal. p. 843.)

Mere recital in a deed that it was executed for a certain purpose is not sufficient evidence of necessity. (Sunker Lal *v.* Jadu Buns, 9 W. R. 285; Raj Luckee Devi *v.* Gocool Chandra Chowdry, 2 P. C. J. p. 518.)

Equities setting as an alienat by a wido

If a female heiress in possession makes an alienation for a necessary purpose, then it is valid against the reversioner and all the world; and the reversioner cannot have the alienation set aside by offering to pay the consideration money. If the alienation is not for a necessary purpose, then it is void, and the alienee cannot claim any relief by way of equity. The alienee must take upon himself the consequence of dealing with one, who, he ought to have known, possessed only a limited right.

If the heiress sells a larger portion of the estate than is necessary, then the reversioner can have the alienation set aside only by paying the amount for which the widow could lawfully bind the estate. (Phool Chand *v.* Roghu Buns, 9 W R. 108; Muttee Ram Kowar *v.* Gopal Sahoo, 11 B. L. R. 416.)

CHAPTER XII.

SECTION I.

CAPACITY OF FEMALES TO HOLD PROPERTY INDEPENDENTLY.

In dealing with the probable origin of the institution of marriage, it has been shown that, even, in the most primitive times, every member of the male sex, who feels himself capable of procuring more food than is absolutely necessary for his own support, must naturally be inclined to have a member of the opposite sex constantly under his power, and within his reach. On the other hand, females would be equally inclined to submit their independence for the sake of maintenance and protection. As to intellectual power there is apparently little difference between the two sexes. But the physical incapacity caused by the bearing of children, and by the cares of maternity, places women at a disadvantage; and they are generally obliged to sacrifice their freedom and individuality to the male members of the community who take the utmost advantage of their position.

In later times, men are prompted not only by love and sentiment, but by considerations of self-interest also, to concede a higher position to women than that of mere chattels Absolute equality between the two sexes is not to be found, even at the present day, in any country in the world. The male members even in the most civilized countries, still play the despot. But the moral tyranny, such as that by which widows were compelled to destroy themselves on the funeral pyre, or to live a life of misery, must become impossible, when the moral sense of men is properly roused, and when women will have education to assert their rights. The difference as to physical capacity for work must remain as ever. But a time may arrive, when that difference will affect only the poorer classes, and not those who are well provided with, or are capable of earning the means of living.

As a matter of fact, it is very often found that some females exercise great influence over their husbands and sons. But those are exceptional cases, due to superiority of intellectual capacity on the part of the female. The framework of society, as constituted at present, makes the female members necessarily dependent, however gifted some of them may be. The current of public opinion is also such, that the female members accept the position assigned to them, as a matter of course.

The struggle between despotism and the moral power of healthy public opinion is yet going on, in most civilized countries. What the result will be, it is impossible to predict now. This much, however, is certain, that the tendency is towards equality; and, so far at least, as the power of holding property is concerned, the time will soon come, when there will not be any difference between the two sexes.

Other systems of law as to the capacity of females to hold property.

The capacity of females to hold property independently of their husbands is now recognized, to a greater or less extent, in most systems of jurisprudence. But ancient law is remarkable for stringency of its provisions against the proprietory rights of women. Under the Roman law, in early times, when marriage was entered into with the *conventio in manum*, the wife came entirely under the *manus* or authority of her husband, and all her property became his. At a later period, when the *conventio* was abandoned, the wife's property remained her own, and was disposable by her without the consent of her husband. With regard to the *dos* or dowry, the law was different.

Roman law.

The *dos* was, as Sir Henry Maine says,* "a contribution by the wife's family, or by the wife herself intended to assist the husband in bearing the expenses of the conjugal household. The *dos* of the wife belonged to the husband, and originally his rights over it were unrestricted. But gradually restrictions were imposed upon those rights, and at last the husband could neither mortgage nor sell the immoveable property forming part of the *dos* even with the consent of the wife.

All the property of the wife not included in the dowry was called her *parapherna*, and was her absolute property over which her husband had no control.†

* Early History of Institutions, p 319.
† Mackenzie's Roman Law p 107

English law

By the English law as it stood previous to the passing of the Married Woman's Property Act, generally speaking, all the property of the wife became vested in the husband, who acquired absolute power of disposal over the chattels, and a limited power over the real estate. The only property over which the wife possessed independent and absolute power was her *paraphernalia* consisting of her bed, apparel and personal ornaments suited to her degree, and property settled on her to her separate use.*

By the Married Woman's Property Act, (33 and 34, Vic. 93) it is now provided in England that the wages and earnings of any married woman, acquired or gained by her in any employment, occupation or trade, and also any money or other property acquired by her through the exercise of literary, artistic or scientific skill shall be deemed to be her separate property, over which she has absolute right.

Code Napoleon.

By the Code of Napoleon, the parties to a marriage are declared competent to enter into any special agreement respecting their property. But, independently of express contract, the French Code does not allow a wife much power over her property during coverture.

The early Hindu legislators as to the capacity of females to hold property.

Nowhere were the proprietory rights of women recognized so early as in India; and in very few ancient systems of law have these rights been so largely conceded as in our own. There was a time when females were apparently incompetent to inherit and to hold property. Thus Baudhayana† after declaring the perpetual tutelage of women, cites a passage from the Vedas to the effect that women are incompetent to inherit; and in the Institutes of Manu‡ there occurs the well-known text, "Three persons, a wife, a son and a slave—are declared by law to have *in general* no wealth exclusively their own; the wealth which they may earn is *regularly* acquired for the man to whom they belong." But the effect of these texts has been counteracted by others of a contrary import.

The reason why among

The recognition of proprietory rights in women in early Hindu law is due chiefly to the fact that among Hindus, widows are not remarried. The entire family property

---

* Stephen's Commentaries, Book III, chap. II.

‡ See Dayabhaga, chap XI, sec. VI.

† Manu, chap VIII, 415.

is very often held in the names of females. This would not be done in countries where widows may remarry.

Hindu females came to be regarded from early times as capable of holding property.

The personal ornaments were apparently the kind of property which was recognized as Stridhan, in the earliest times. The prevalence of the Brahmo form of marriage, and of the custom by which every Hindu father is required to make valuable presents to the bridegroom, at the time of giving a daughter in marriage, also contributed materially to the development of the idea that females are capable of holding separate property. In former times, the Asura and the Gandharva forms of marriage prevailed in India. The Gandharva or marriage by courtship still prevails among other nations. The Brahmin Legislators saw the evils of these primitive forms of marriage; and they made it incumbent upon every Hindu father to give his daughter with ornaments, clothes and other presents to a bridegroom versed in the Vedas. As the Brahmo has become the prevailing form of marriage in the country, almost every Hindu wife can point to some property which she brought from her father's house, and which is looked upon as her separate property. Every Hindu must know that the Adhyagni and the Adhyabahanika properties are generally regarded as belonging to the wife. The wife claims them as her separate property; and the other members of the family generally allow her to use them as exclusively her own.

The possibility of the wife holding separate property being recognized, the idea received its utmost expansion. Various descriptions of property came to be regarded as Stridhan. It seems that, at first, there was a limit to the amount. It seems also that, at one time, landed property could not be Stridhan. But these restrictions were latterly explained away by commentators, and disregarded in practice. (See Vyavahara Mayukha on Stridhan) The remarriage of widows being unknown among the Hindus, they generally settle a very large portion of their property on their wives. What is given to the wife cannot be taken back and spent away, in ordinary times. The Stridhan serves as a provident fund, against times of calamity and want. The coparceners, in a joint family, cannot take a share of the Stridhan, at the time of partition. For all these reasons, the practice of settling property on females became common in the country; and the early

legislators and commentators recognized the practice as legal, making provisions, at the same time, for regulating the course of succession to such property.

Sir H. Maine's explanation of the origin of Stridhan.

Sir Henry Maine seems to be of opinion that the Bride Price was the earliest form of Stridhan. "Among the Aryan communities" says Sir H. Maine* "we find the earliest traces of the separate property of women in the widely diffused ancient institution known as the Bride Price. Part of this price, which was paid by the bridegroom either at the wedding or the day after it, went to the bride's father as compensation for the patriarchical or family authority which was transferred to the husband, but another part went to the bride herself, and was very generally enjoyed by her separately, and kept apart from her husband's property." To me, however, it seems that personal ornaments were the earliest form of Stridhan at least in India. Even in English law the *paraphernalia* over which alone a wife had absolute power before the passing of the Married Woman's Property Act consisted mainly of wearing apparel and ornaments. It may be that among some Aryan nations a part of the Bride Price is given to the girl by the father But in India the practice of taking any fee or gratuity from the bridegroom prevails only among the poorer classes Where the father takes any money, he very seldom settles any portion of it on the girl. The Hindu father who sells his daughter generally takes the whole amount to his own use. Such being the case, the theory that Stridhan originated in Bride Price seems hardly tenable. What seems more probable is, that the conception of Stridhan originated in personal ornaments, and in the property settled on the woman by her parents either at the time of marriage or before or after that event.

Commented upon.

Section II.

THE VARIOUS DESCRIPTIONS OF STRIDHAN.

The following are usually considered as Stridhan:—

1. *Adhyagni*.—What is given to women, at the time of marriage, near the nuptial fire, is celebrated by the wise

---

* Early History of Institutions, pp 321-324.

as Adhyagni It usually consists of ornaments, clothes, money, household furniture, and utensils.

2. *Adhyavahanika.*—That which a woman receives while she is conducted from the parental abode to her husband's dwelling is called Adhyavahanika according to Katyana's definition of the term. It is a well-known fact that Hindu fathers give valuable properties to the daughter, not only at the time of marriage, but also at the time when she is taken to the husband's house, for the first time after maturity. The Adhyavahanika usually consists of clothes, beddings, plates, a cash box, a chest and articles of toilette.

3. *Anwadheyaka.*—What is received by a woman from the family of her husband or parents after marriage is called Anwadheyaka.

4. *Bhartri Daya.*—According to Jimutavahana, it is property given by the husband.

5. *Sulka.*—According to the Mitakshara, Sulka is equivalent to what is called Bride Price. (Mitakshara, chap. II, sec. XI, para 6). According to the Dayabhaga, Sulka means what is given by the husband to induce the wife to go to his house.

6. *Saudaika.*—What is received by a married woman or by a maiden, in the house of her husband or of her father, from her husband, or from her parents is termed Saudaika.

7. *Pritidatta.*—What is given to a woman by her mother-in-law or father-in-law through affection, or at the time when she pays her respects to them is Pritidatta.

8. *Adhivedanika.*—Presents given to a senior wife on the occasion of marriage of the husband with a second one.

The following Shmriti texts with reference to Stridhan may be usefully referred to :—

अध्यग्न्यध्यावाहनिकं दत्तञ्च प्रीतितः स्त्रियैः ।
भ्रातृमातृपितृप्राप्तं षड्विधं स्त्रीधनं स्मृतं ॥

Manu, chap IX, 194.

वृत्तिराभरणं शुल्कं लाभश्च स्त्रीधनं भवेत् ।
भोक्त्री तत् स्वयमेवेदं पतिर्नार्हत्यनापदि ॥

Devala.

अध्यग्न्यध्यावाहनिकं भर्तृदायस्तथैव च ।
भ्रातृदत्तं पितृभ्यां च षड्विधं स्त्रीधनं स्मृतं ॥

Narada, XIII, 8.

पितृमातृसुतभ्रातृदत्तमध्यग्न्युपागतं ।
आधिवेदनिकं बन्धुदत्तं शुल्कान्वाधेयकमिति ॥

Vishnu, XVII, 18.

पितृमातृपतिभ्रातृदत्तमध्यग्न्युपागतं ।
आधिवेदनिकाद्यञ्च स्त्रीधनं परिकीर्त्तितं ॥

Yajnyavalkya, II, 144.

From these and other Shmriti texts usually cited in the digests which are regarded as authoritative in the several schools, it is established beyond doubt that the following descriptions of property are Stridhan :

1. Ornaments.
2. Property given by relatives, friends and strangers at the time of marriage.
3. Property given by the family of the parents before or after marriage.
4. Property given by the family of the husband, or by the husband himself after marriage.

In commenting on the text of Yajnavalkya, Vijnaneshwar says—

"That which was given by the father, by the mother, by the husband, or by a brother; and that which was presented by the maternal uncles, and the rest at the time of wedding before the nuptial fire; and a gift on a second marriage or gratuity on account of supercession, as will be subsequently explained in the text, 'To a woman whose husband marries a second wife let him give, &c.,' and, (as indicated by the word *adya*—and the rest) property obtained by inheritance, purchase, partition, acceptance, finding; are all Stridhan according to Manu and the rest."

Is property inherited Stridhan.

Vijnaneshwar then remarks: "The term Stridhan (woman's property) conforms in its import with its etymology, and is not technical; for if the literal sense be admissible, a technical acceptation is improper.

Mitakshara.

From this it would appear that, according to Vijnaneshwar, property inherited by a widow or daughter is Stridhan. But even if inherited property be Stridhan, still it does not follow that the widow or the daughter has absolute power over such property, or that the course of succession to such property is the same as in respect of

other kinds of Stridhan. The texts of Katyana, Paithinasi and Mahabharat, which declare that the widow and the daughter can have only a limited right over property inherited by them as such, and that on their death the estate goes to the next heirs of the last male owner, are at least as binding on the followers of the Mitakshara as the Mitakshara itself, if not more so. If the Mitakshara contained anything in direct opposition to the texts of Katyana and Paithinasi, then the question would have arisen, whether the Mitakshara should be followed even where its doctrines are directly opposed to the Shmritis? But Vijnaneshwar only says generally, that every description of property belonging to a female is Stridhan. It is, therefore, quite open to his followers to admit the texts of Katyana, Mahabharat and Paithinasi to qualify the general rule of succession to Stridhan, in the special cases of property inherited by female heirs from males. A special rule will, in all cases, prevent the operation of a general rule. It is not to be supposed that the Mitakshara is an exhaustive treatise on law. Where it is silent or doubtful, the texts of original Shmritis, and the opinions of authoritative writers may well be taken to supplement, and to explain it.

It has been held by the Bengal High Court and by the Privy Council, in the cases* noted below, that, even among those who follow the Mitakshara, the widow and the daughter take a qualified estate, and that on their death, the estate goes to the next heirs of the last male owner. The correctness of these decisions has been questioned by several high authorities. In fact, Mr. Justice Pontifex who delivered judgment, in the Court of first instance, in the case of Chotay Lal *v.* Chunnoo Lal had grave doubts as to the correctness of the decisions which he felt himself bound to follow. But, as shown above, the decisions of the Bengal High Court and of the Privy Council on the point are perfectly justifiable; and it is not necessary nor desirable that they should be reconsidered.

The Viramitrodaya, like the Mitakshara, maintains

---

* Mussamut Thakoor Dayi *v* Rai Baluk Ram, 11 M I A. 139.
Bhagwandeen Dooby *v* Myna Bai, 11 M I A 487
Chotay Lal *v.* Chunnoo Lal, 22 W. R. 496.

Viramitrodaya. that whatever is owned by a woman is her Stridhan. But Mitra Misra distinctly admits that the quality of being freely alienable, which generally attaches to Stridhan, may not attach to every kind of it, thus showing that the operation of the general rule as to succession and disposal may be counteracted by special texts. Mitra Misra lays down, on the authority of the text of Katyana, that, after the death of the widow, the husband's heirs succeed.

Mayukha. The Mayukha, like the Mitakshara, interprets Manu's enumeration of six kinds of woman's property to mean only the denial of a smaller number, and refers to the word *adya* (and the rest) in Yajnavalkya's text in support of that interpretation. Nilkantha does not expressly declare that the force of the word *adya* is sufficient to include all acquisitions whether by inheritance, partition, or the like. Nilkantha draws a distinction between *paribhasika* and *aparibhasika*, Stridhan, and it seems that, in his opinion, the word *adya* has the force which Vijnaneshwar gives to it, though the rule of succession to Aparibhasik is different from that applicable to Paribhasik.

According to the Bombay decisions, the widow has absolute power over moveables, but not over immoveables; and on her death, the succession goes to the next heirs of the husband living at the time. (Bhaskar Trimbak *v.* Mahadev Ramjee, 6 Bom. 1.)

The daughter takes an absolute estate according to the Bombay High Court The daughter can make alienations during her lifetime; and on her death the estate goes to her heirs. (Vijay Rangam *v.* Lakshman, 8 Bom. 244; Hari Bhat *v.* Damodar Bhat, I. L. R. 3 Bom 171; Babajee Bin Narayan *v.* Balaji Ganesh, I. L. R. 5 Bomb. p. 660. In the Bombay Presidency, sisters are entitled to inherit; and where they do so, they take an absolute estate like a daughter. (Bhagiratee Bai *v.* Boya, I. L. R. 5 Bomb. p. 264.)

In the Bombay Presidency, the widows of Gotraja Sapindas inherit. But where they do so, they do not take an absolute estate, (Bhorman Gavda *v.* Rudrapa Gavda, I. L. R. 4 Bom. 181.)

The Southern school follows the Shmriti Chandrika and the Madhavya, in addition to the Mitakshara, as its leading authorities. The Madhavya does not give to the

suppletory term *adya*, that force which Vijnaneshwar gives to it. By the word *adya*, according to the Madhavya, is included only such property as is purchased with what is admittedly Stridhan.

Madhavya.

The Shmriti Chandrika agrees in substance with Madhavya, with the difference only that it does not assign any definite meaning to the word *adya* in Yajnavalkya's text. Devananda excludes gains by mechanical arts from the category of Stridhan. It is, therefore, evident that according to him, the word Stridhan has a technical meaning in law, and not the meaning which flows from its derivation.

Shmriti Chandrika.

It is not very clear whether, according to the Shmriti Chandrika, property inherited by a woman becomes her Stridhan. Devananda explains the text of Katyana as applicable to the case of "undivided wealth which a widow may herself take on account of her subsistence, in consequence of her father-in-law, and the like, not being qualified to maintain her, or continuing engaged in other concerns" and not to the separate property of her husband which she takes by* inheritance. Then again there is a passage in Kristnaswamy's translation to the effect that "whatever the mother takes she takes for herself like the Stridhan called *adhayagni* and the like." But whatever may be the view of the Southern authorities with reference to the point under consideration, it is now settled by the course of decisions that the widow and the mother and the daughter take a qualified estate, (Collector of Mauslipatam *v.* Vencata Narain Appa, 8 M. I. A. 529; P. Bachiraja *v.* Vencatappadu, 2 Mad. 402; Sengamalathammal *v.* Valayanda Mudali, 3 Mad. H. C. 312; Katama Natchiar *v.* Dora Sing, 6 Mad H. C. 310.)

In Sengamalathamal v. Valayanda Mudali, the High Court of Madras gave a further extension to the doctrine that inherited property is not Stridhan, by holding that the mother's Stridhan, passing by inheritance to her daughter, does not become the Stridhan of the daughter.

The leading authority in the Mithila school is the Vivada Chintamoni. Vachaspati does not define what is Stridhan; but, like Devananda, enumerates and defines the several descriptions of property which rank as Stridhan.

* Shmriti Chandrika, p. 62; Bharat Shiromany's Edition.

The text of Yajnavalkya, which forms the basis of the unlimited interpretation of the term *stridhan*, in the Mitakshara and the Viramitrodaya, is neither cited nor even referred to in the Chintamoni. The several kinds of property which are regarded as Stridhan are enumerated; and it would appear that, according to the Chintamoni, no other kinds of property, besides those enumerated in the texts, come under the denomination of Stridhan.

Vivada Chintamony.

As regards property inherited by a widow from her husband, the author's meaning is not very clear. He draws a distinction between moveables and immoveables, and holds that the widow's power of disposal over the former is absolute. But then, he adds, that the texts of Katyana from which the distinction is deduced, do not refer to Stridhan.

It remains now to consider the definition of *stridhan* according to the Bengal school. The Dayabhaga restricts the application of the term to certain descriptions of property belonging to a woman. Jimutavahana maintains, that property belonging to a woman, in order that it may be called Stridhan, must possess the quality of being alienable by her at pleasure. (Dayabhaga, chap. IV, sec. I, para. 18.)

Jimutavahana's definition of Stridhan.

After examining the various enumerations and definitions of different varieties of *stridhan* according to the different sages, Jimuta says: "Since various sorts of separate property of a woman have been then propounded without any restriction of number, the number 6 (as specified by Manu and others) is not definitely meant. But the texts of the sages merely intend an explanation of woman's separate property. That alone is her peculiar property which she has power to give, sell or use independently of her husband's control. Katyana explains this concisely: 'The wealth, which is earned by mechanical arts or which is received through affection from any other [but the kindred] is always subject to her husband's dominion. The rest is pronounced to be woman's property. From the text of Katyana cited above, and from the well-known text of the same sage relating to the nature of the right which a widow possesses in the estate inherited by her from her husband, it is established that a female cannot have absolute power of disposition over—

1. What is earned by mechanical arts.
2. What is given by strangers except as *jautaka*.
3. What is taken by her by way of inheritance from males or females.

These three kinds of property are not Stridhan, according to the Dayabhaga. There is a text of Narada quoted in chap. IV, sec. I, para. 23 of the Dayabhaga, according to which, immoveable property given by the husband is not alienable by the wife. Such property cannot, therefore, be regarded as Stridhan, according to Jimuta's definition of the term.

It has been held by the Bengal High Court that the Stridhan of a female does not continue to be so, when it passes by inheritance to the hands of a female heiress. (Bhoobun Mohun Banerjea *v.* Mudan Mohun Sing, 1 Shome's Law Reporter, p. 3.) The authority of Sreekishen is clear on the point, (chap. II, sec. III, para. 6. Krama Sangraha). The Dayabhaga says nothing explicitly. But considering the reading of Yajnavalkya's text in the Dayabhaga, it seems that it is not open to Jimutavahana and his followers to include under the category of Stridhan any property that does not come under the head of Adhyagni, Adhyabahanika, &c. Such being the case, property inherited by a female cannot be regarded as Stridhan, even where it was so in the hands of the last owner.

A legacy is regarded in the light of a gift; and it is considered as Stridhan, in the hands of a female legatee, where a gift from the testator would rank as such. (Jadu Nath Sircar *v.* Basanta Kumar Chowdry, 19 W. R. 269.)

It has been held that a Hindu wife takes by the will of her husband no more absolute right over the property bequeathed than she would take over such property, if conferred upon her by gift, during the lifetime of her husband. As the wife can have only a limited right in respect of immoveable property given to her by her husband, her right to such property is similarly limited, where the property is bequeathed in her favour by the will of her husband. (Kunja Behari Dhur *v.* Ram Chand Dutt, I. L. R. 5 Cal. p. 684.)

Gifts to a widow in lieu of maintenance have been held to come within the definition of Stridhan, property so given being what is called वृत्ति in Devala's definition of

Stridhan. (Mussamut Durga Koonwar *v.* Tijoo Koonwar, 5 W. R. Mis. 53.)

What is purchased with the income of Stridhan is Stridhan. (Luchmun Chandra Geer Gossain *v.* Kali Charan Sing, 19 W. R. 292.)

Property purchased with the accumulation of the income of the estate which comes into the hands of a widow by way of inheritance from her husband is not Stridhan. (Sreemutty Poddomonee Dassee *v.* Dwarka Nath Biswas, 25 W. R. 335.)

Where property had been inherited by a widow from her husband, and afterwards confiscated by Government, such property, on being subsequently granted to the widow by Government was held to rank as her Stridhan. Brij Indu Bahadur Sing *v.* Ranee Janki Koer, 1 C. L. R. 318.)

The share which a woman obtains on partition is her *stridhan*, according to the Benares and the Maharastra schools, but it does not rank as Stridhan according to the law of Bengal.

It has been held that the burden of proving that any property belonging a woman is her Stridhan is on the party who makes such allegation. (Sreemutty Chandra Monee Dassee *v.* Joy Kissen Sircar, 1 W. R. 107.)

In a later case Mr. Justice Field held that in the absence of any evidence to show the source from which the purchase money was derived, there is no presumption that property purchased in the name of a Hindu wife is the property of her husband. (Chowdrany *v.* Tariny Kant Lahiry, I. L. R. 8 Cal. p. 545. But see I. L. R. 10 Cal.)

SECTION III.

ORDER OF SUCCESSION TO STRIDHAN ACCORDING TO THE MITAKSHARA.

With reference to the course of succession to the estate of a female, Yajnavalkya says:—

पितृमातृपतिभ्रातृ दत्तमध्यग्न्युपागतं ।
आधिवेदनिकाद्यञ्च स्त्रीधनं तत् प्रकीर्त्तितं ॥
बन्धुदत्तं तथा शुल्कमन्वाधेयकमेव च ।
अतीतायामप्रजसि बान्धवास्तदवाप्नुयुः ॥

अप्रजस्त्रीधनं भर्तुं ब्राह्मादि चतुर्ष्वपि ।
दुहितॄणां प्रसूता चेच्छेषेषु पितृगामि तत् ॥

Yajnavalkya, chap. II, 148-150.

[What was given to a woman by the father, the mother, the husband or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, as also any other (separate acquisition) is denominated a woman's property. That which has been given to her by her kindred, as well as her fee or gratuity, or anything bestowed after marriage. Her kinsmen take it, if she die without issue. The property of a childless woman, married in the form denominated Brahmo or in any of the four unblamed forms of marriage, goes to her husband: but if she leave progeny it goes to her (daughter's) daughters; and in other forms of marriage (as the Asura) it goes to her father and mother on failure of her own issue.

In commenting on this text Vijnaneshwar says:—"If a woman die" without issue; that is, leaving no progeny; in other words, having no daughter, nor daughter's daughter, nor daughter's son, nor son, nor son's son; the woman's property, as above described, shall be taken by her kinsmen, namely, her husband and the rest, as will be forthwith explained.

"Of a woman dying without issue as before stated, and who had become a wife by any of the four modes of marriage denominated Brahmo, Daiva, Arsha, and Praja Patya, the whole property, as before described belongs in the first place to her husband. On failure of him, it goes to his nearest (Sapindas) or blood relations. But in the other forms of marriage called Asura, Gandharva, Rakshasha and Paisacha; the property of a childless woman goes to her parents, that is, to her father and mother. The succession devolves first on the mother, who is virtually exhibited first in the elliptical phrase *pitrigami* implying goes (*gachati*) to both parents (*pitarau*) that is, to the mother and to the father. On failure of them their next of kin take the succession."

"In all forms of marriage, if the woman 'leave progeny;' that is, if she have issue; her property devolves on her daughters. In this place, by the term 'daughters' granddaughters are signified, for the immediate female

मातुर्दुहितरः शेषमृणात्ताभ्य ऋतेऽन्वयः ।

Yajnavalkya II, 120.

Hence if the mother be dead, daughters take her property, in the first instance: and here, in the case of competition between married and maiden daughters, the unmarried take the succession; but, on failure of them, the married daughters; and here again in the case of competition between such as are provided and those who are unendowed, the unendowed take the succession first; but, on failure of them, those who are endowed. Thus Gautama* says, "A woman's property goes to her daughters unmarried or unprovided;" or provided as is implied by the conjunctive particle in the text. Unprovided are such as are destitute of wealth or without issue."

"But this [rule, for the daughter's succession to the mother's goods] is exclusive of the fee or gratuity. For that goes to brothers of the whole blood, conformably with the text of Gautama—

भगिनीशुल्कं सोदर्य्याणामूर्द्ध्वं मातुः पितुश्च

Gautama, 28, 25.

"On failure of all daughters, the granddaughters in the female line take the succession under the text—

दुहितॄणां प्रसूता चेत्

"If there be a multitude of these granddaughters, children of different mothers, and unequal in number, shares should be allotted to them through their mothers, as directed by Gautama:—

प्रतिमातृ वा स्ववर्गे भागविशेषः

Gautama, 28, 15.

"But if there be daughters as well as daughter's daughters, a trifle only is to be given to the granddaughters. So Manu declares—

यास्तासां स्युर्दुहितरस्तासामपि यथार्हतः ।
मातामह्या धनात् किञ्चित् प्रदेयं प्रीतिपूर्व्वकं ॥

Manu, IX, 193.

* स्त्रीधनं दुहितॄणामप्रत्तानामप्रतिष्ठितानाञ्च

Gautama, 28, 22.

"On failure of daughter's daughters, the daughter's sons are entitled to the succession. Thus Narada says—

मातुर्दुहितरोऽभावे दुहितॄणां तदन्वयः ।

Narada, 13, 1.

"If there be no grandsons in the female line, sons take the property : for the holy sage has declared :

मातुर्दुहितरः शेषमृणात्ताभ्यो ऋतेऽन्वयः ।

Yajnavalkya, II, 120.

"Manu likewise shows the right of sons, as well as of daughters, to their mother's effects."

जनन्यां संस्थितायान्तु समं सर्व्वे सहोदराः ।
भजेरन्मातृकं रिक्थं भगिन्यश्च सनाभयः ॥

Manu, IX, 192.

"All uterine brothers should divide the maternal estate equally, and so should sisters by the same mothers. Such is the construction and the meaning is not that 'brothers and sisters share together;' for reciprocation is not indicated, since the abridged form of the conjunction compound has not been employed, but the conjunctive particle *(cha)* is here very properly employed with reference to the persons making the partition; as in the example Deva Datta practises agriculture, and so does Yajnadatta.

"Equally" is specified to forbid the allotment of deductions (to the eldest and so forth). The whole blood is mentioned to exclude the half blood.

"But though springing from different mothers, the daughter of a rival wife, being superior by class, shall take the property of a childless woman who belongs to an inferior tribe. Or, on failure of the step-daughter, her issue shall succeed. So Manu declares—

स्त्रियास्तु यद्भवेद्वित्तं पित्रा दत्तं कथञ्चन ।
ब्राह्मणी तद्धरेत् कन्या तदपत्यस्य वा भवेत् ।

Manu, IX, 198.

"The mention of a Brahmani is meant to include any superior class. Hence the daughter of a Kshatriya wife takes the goods of a childless Vaisya."

"On failure of sons, grandsons inherit their paternal grandmother's wealth. For Gautama says "they who share the inheritance must pay debts.'"

रिक्थभाज ऋणं प्रतिकुर्युः

Gautama, 12, 32.

The grandsons are bound to discharge debts of their paternal grandmother, for the holy sage has declared that—

पुत्रपौत्रै ऋणं देयं

Yajnavalkya, II, 50.

Such being the law, it follows that grandsons are entitled to take as heirs the Stridhan of their grandmothers.

"On failure of grandsons also, the husband and other relatives above-mentioned are successors to the Stridhan of a female. Mit. chap. II, sec. XI.

From the above commentary, it appears that the following is the order of succession as to Stridhan :—

Summary of the order of succession to Stridhan according to Mitakshara.

1. Unmarried daughter.
2. Married daughter unendowed.
3. Married daughter endowed.
4. Daughter's daughter.
5. Daughter's son.
6. Son.
7. Grandson.
8. The unmarried daughter of a rival wife of a superior class.
9. Either husband and his Sapindas, or parents and their Sapindas according to the form of marriage.

Comparative poverty is the only criterion for settling the claims of daughters. (Audh Kumari *v.* Chandra Dai, I. L. R. II All. 561; Wooma Dai *v.* Gokoolanand, I. L. R. III Cal. 587.)

Unchastity in a woman does not incapacitate her from inheriting Stridhan. (Ganga Jati *v.* Ghasiti, I. L. R. 1 All. 46.)

There is no special authority to show that an adopted son can inherit the adoptive mother's Stridhan. There is a ruling cited in West and Buhler's Digest to the effect that an adopted son may inherit the property of the adop-

tive mother. (See page 513, Third Edition.) It has been also ruled by the Bengal High Court that an adopted son may be heir to the Stridhan of the adoptive mother. (Tin Cowry Chattopadhya *v.* Dinanath Banerjea, 3 W. R. 49). So far as the Bengal school is concerned, there is apparently authority for the last mentioned ruling, in the commentary of Sreekishen. (See P. C. Tagore's Edition, p. 174.)

Right of adopted son as to adoptive mother's Stridhan.

Whether the adopted son of a woman can inherit her rival wife's Stridhun is a question which was incidentally referred to in the judgment of the High Court in the case of Tin Cowry *v* Dina Nath. The opinion of the learned Judge who delivered judgment in that case seems to be in favour of the rival wife's adopted son. There is no doubt that the Aurasa son of a rival wife is regarded in the eye of law as a secondary son to the stepmother. But considering the maxim that there cannot be an* *atidesh* from *atidesh*, it seems doubtful whether the adopted son of a rival wife can be regarded as having any relation to the stepmother. The adopted son of a co-wife may succeed as stepson, but not by virtue of the text which makes the rival wife's son equal to a son of the body.

It is doubtful whether an adopted son, can inherit the Stridhan of the adoptive mother where there is an Aurasa son born afterwards. In the Bengal school the authority of Sreekishen seems to be against the adopted son under such circumstances. Supposing that an adopted son is capable of inheriting along with an Aurasa, the shares would be the same as in succession to the property of a male. Comment on Dayabhaga P. C. Tagore's Edition, p. 143.

On failure of heirs down to the son's son, the order of succession varies according to the form in which the deceased female was married; there being one order of succession to her Stridhan, if her marriage took place in one of the four superior forms, namely, the Brahmo, the Daiva, the Arsha and the Prajapatya; and a different order if her marriage took place in one of the inferior four forms In the former case, the heirs are the husband and his kinsmen; and in the latter case they are the parent and their kinsmen. But who are successively the next of kin in either case or, in other words, what is the order of nearness among kindred, the author of the Mitakshara does not explain.

Order of succession in default of issue.

The order of succession, in respect of Stridhan, as laid down in the Viramitrodaya is different from that of the Mitakshara, in many important points. The Viramitrodaya cannot, therefore, be taken as a guide in determining the order of succession among the Sapindas of the husband and father. In fact Mitra Misra's work does not throw any light on the point

Who are husband's Sapindas.

According to Kamalakor, the nearness of Sapindas is to be determined by the rule given in the Mitakshara for the devolution of the property of a male owner dying without male issue. "In default of the husband" says Kamalakor, "the daughters, sons, and daughter's sons of the rival wife and in their default, the mother-in-law, the father-in-law, the husband's brother, his sons, and other next of kin of the husband succeed according to the text. "The wife and the daughters also &c.' This is the opinion of Vijnaneshwar and Apararka." Kamalakor's opinion is entitled to be followed as an authority in the Benares school, where it is not in conflict with that of any higher authority. In the present instance, the rule based on his opinion has the further recommendation of being simple. It may also be urged that if this were not what Vijnaneshwar meant, and if he had not referred to this known order after the husband, he would have continued his enumeration further. Accepting then Kamalakor's interpretation of Vijnaneshwar's rule, the successive heirs after the husband would be the stepson, the step-grandson, the rival wife, the stepdaughter,* her son, the husband's mother, his father, his brothers, their sons, &c.

Order of succession among husband's and father's Sapindas.

Following the above mode of determining nearness among Sapindas, the successive heirs to the property of a childless woman married in the Asura, Gandharva, Rakhasa and Paisacha forms, would be the father, the brother, his son, the mother, the sister, her son, the father's mother, the father's father, &c.

The course of succession according to the Mitakshara is the same in respect of every description of Stridhan with the exception of *Sulka* which is, as defined by Vijnaneshwar, wealth "for the receipt of which the woman is given in marriage." The *Sulka* goes to the brother of the whole blood, in the first instance, according to Vijnaneshwar. (See text quoted in p. 382 *ante*.)

* The daughter of a rival wife of a superior class takes before husband.

SECTION IV.

SUCCESSION TO STRIDHAN—MAYUKHA AND SHMRITI CHANDRIKA.

The author of the Mayukha, as seen already, divides woman's property into two main classes, *viz.*,

1. Stridhan of the several kinds which have technical names.
2. Other descriptions of property belonging to a woman.

As regards the second class, Nilkantha says that the son and the rest succeed to such property; and it has been held that the course of succession to such property is the same as that in respect to the property of a male. (Vijaya Rangam *v.* Lakshman, 8 Bomb. 244)

For the purpose of laying down the order of succession, Nilkantha divides Stridhan proper into the five following classes :—

I. *Anwadheyaka* or gift received after marriage from the husband's family; and *Pritidatta* or property given by the husband through affection.
II. The *Yautaka* or nuptial gifts.
III. The other descriptions of Stridhan property.
IV. Bandhudatta.
V. *Sulka* and maiden's property.

Order of succession to Anwadheya and Pritidatta.

With regard to class I, Nilkantha cites texts from Manu and Katyana* and deduces the rule that Stridhan coming under this class is inherited by sons and unmarried daughters, in the first instance. If there be no unmarried daughters, then married daughters take equal shares with sons.

---

* अन्वाधेयञ्च यद्दत्तं पत्या प्रीतेन चैव यत् ।
पत्यौ जीवति वृत्तायाः प्रजायास्तद्धनं भवेत् ॥

Manu, IX, 195.

जनन्यां संस्थितायान्तु समं सर्व्वे सहोदरा ।
भजेरन्मातृकं रिक्थं भगिन्यश्च सनाभयः ॥

Manu, IX, 192

To Jautaka property of the mother.

The rule of succession to nuptial gifts (Yautaka) is deduced from a text of Manu which says that "property given to the mother on her marriage is inherited by the unmarried daughters."

मातुस्तु यौतकं यत् स्यात् कुमारीभाग एव सः।

Manu, IX, 139.

The heirs to Yautaka property of a woman, in default of maiden daughters, are not clearly mentioned in the Mayukha. It seems that after the maiden daughter, the course of succession is the same as in respect of Anwadheya.

To other descriptions of Stridhan proper.

As to other descriptions of Stridhan proper, the order of succession laid down in the Mayukha is as follows:—

1. Daughters and Brahmini step-daughters unmarried, and unendowed.
2. Daughter's children.
3. Sons.
4. Grandsons.

Nilkantha seems to lay down that only daughters, unmarried and unendowed, inherit jointly. It seems also intended that the daughter's sons and daughter's daughters should take simultaneously. But these points are not free from doubt.

In default of children of the body, the course of succession varies according to the form of marriage. In the case of any woman married in the four approved forms, and in the case of Kshatriya women married in the Gandharva form which is allowed in the case of Kshatriyas, the inheritance goes to the husband. In all other cases, the inheritance goes to the father, in default of children. In default of the husband or the father, as the case may be, the nearest Sapindas of the female succeed. Who the nearest Sapindas of the female are, is not clearly stated. But later on, the author says, that in default of the husband or the father, the heirs are those who are enumerated in the following text of Vrihaspati:

मातृष्वसा मातुलानी पितृव्यस्त्री पितृष्वसा।
श्वश्रुः पूर्व्वजपत्नी च मातृतुल्याः प्रकीर्त्तिताः॥
यदासामौरसो न स्यात् सुतो दौहित्र एव वा।
तत्सुतो वा धनं तासां स्वस्रीयाद्याः समाप्नुयुः॥

According to this text the heirs, in default of the husband or father, are—

1. Sister's son.
2. Husband's sister's son.
3. Husband's brother's son.
4. Brother's son.
5. Son-in-law
6. Husband's younger brother.

Taking all that the author says in the chapter into consideration, it seems that, in the above list, the relatives on father's side succeed in the case of a woman married in the disapproved forms of marriage; and in the case of a woman married in any of the approved forms of marriage, the inheritance goes to the relatives on the side of the husband, in the above list. This point again is not free from doubt

From the answers to questions in the Digest of Messrs. West and Buhler, it appears that, according to the Western Pandits, the Stridhan of a female goes to other Sapindas, first to those of the same Gotra, and then to those of different Gotra. It also appears that on failure of husband's Sapindas, the blood relations of the woman herself may succeed to her Stridhan according to the Bombay Shastris. The husband's Somanadokas ought, it seems, to come before the father's Sapindas. But there is no authority on the point.

Wealth given by Bandhu at an Asura marriage.

In respect of property given by the kindred (bandhu) at an Asura marriage or the like, Nilkanta cites a text of Katyana which runs thus:—" That which was given to her by her bandhu goes on failure of bandhus to her son.

Sulka.

The Mayukha like the Mitakshara, declares, upon the authority of Gautama's text, that the sister's Sulka goes to the uterine brothers before the mother.

If the girl dies before marriage then the Sulka is taken back by the bridegroom to whom she had been affianced.

Maiden's property.

Touching the devolution of the property of a maiden, Nilkanta cites the following text of Baudhayana—

रिक्थं मृतायाः कन्याया ग्रह्णीयुः सोदराः समं ।
तदभावे मातुस्तदभावे पितुर्भवेत् ॥

[The wealth of a deceased damsel let the uterine brethren take equally; on failure of them, it shall belong

to her mother, or if she be dead, to the father.] This text applies, according to Nilkantha, where the maiden daughter received the property from the maternal grandfather and the like, and where the maiden dies as such, *i. e.,* before marriage.

2. *Shmriti Chandrika.*

The law, with reference to the course of succession to Stridhan, as laid down in the Shmriti Chundrika is in many important respects similar to the law of the Mayukha as summarized above. Devananda divides Stridhan into the following classes :—

1. Anwadheyaka and Pritidatta
2. Yautaka.
3. Adhyagni, Adhyavahanika, &c.
4. Bandhu Datta.
5. Sulka.
6. Maiden's property.

Devananda does not apparently take the word *adya* in Yajnavalkya's text in the sense which Vigyaneshwar assigns to it. Any how, property acquired by inheritance or the like is not expressly included, in the Chandrika, under the category of Stridhan. In the Mayukha there is a distinction made between *paribhasik* and *aparabhasik* Stridhan. But the *paribhasik* alone seems to be recognized as Stridhan by the author of the Chandrika.

The classification of Stridhan proper is very nearly the same in the Chandrika and the Mayukha. The author of the Mitakshara does not make any distinction between the different kinds of Stridhan, for purposes of succession. Vijnaneshwar lays down the same rule for all kinds of Stridhan. But the texts are so conflicting that they cannot be reconciled except by assigning to them different fields of application; and Vijnaneshwar's views have not been accepted by any of the later commentators.

After taking into consideration all the texts with reference to the course of succession to Stridhan, Devananda arrives at the following conclusions.

That the text of Manu and Vrihaspati which authorise the joint succession of sons and daughters, relate to the Anwadheya *Stridhan* and to the affectionate gifts of the husband.

2. That the exclusive right of maiden daughters relates to the mothers *Yautaka* as declared by one of the texts of Manu.

3. That the text of Goutama applies to the other kinds of Stridhan of a married woman; and that the heirs to such Stridhan, in the first instance, are the unmarried daughter, and the married daughter who is unprovided.

To the Anwadheya and the Pritidatta, unmarried daughters succeed simultaneously with sons. If there be no uumarried daughters, then married daughters share with sons according to the text of Vrihaspati. Widowed daughters cannot share with sons. The Chandrika is silent as to who are the heirs in default of sons and married daughters. In the absence of any provision to the contrary, in the Chandrika and the Madhavya, the Mitakshara is followed in the Dravira school; but as there is no authoritative decision on the point, it is difficult to say what the law is in the Southern school.

To the Yautaka, maiden daughters alone succeed, in the first instance under the text of Manu to that effect. In default of maiden daughters sons take the Yautaka of their mother. The Chandrika is silent as to who should succeed to mother's Yautaka in default of sons.

To the other kinds of Stridhan of a married woman, the heirs, in default of unmarried and unprovided daughters, are the daughter's daughter, daughter's son, sons, son's sons as under the Mitakshara. In default of all those, the daughter of a rival wife of a superior caste may take. Grandchildren, whether son's sons or daughter's sons, take *per stirpes* and not *per capita*.

The order of succession to the property of a woman who leaves no progeny, that is, neither children nor grandchildren, is regulated by the form of marriage, as in other schools. From the texts bearing on the point, the author of the Chandrika deduces the following rules:

1. The property of a childless woman goes to her husband, if she had been married in one of the five approved forms.

2. In other cases, it reverts to her father or other kinsmen from whom she had received it; and it is only in default of such kinsmen, that the husband inherits in such cases.

3. The Sulka of a married woman is taken by her brother and mother in succession, and not by the giver

4. Sulka of an unmarried damsel is taken by the giver.

5. Property, other than Sulka, belonging to unmarried damsels is taken by the brother, mother and father in succession as declared by the text of Baudhayana* quoted below and in page 389 *ante*.

According to the text of Brihaspati quoted in page 388 *ante* the heirs to Stridhan, in default of all those mentioned above, are the following:

1. Sister's son.
2. The husband's sister's son.
3. The husband's brother's son.
4. The brother's son.
5. The son-in-law.
6. Husband's younger brother.

In default of all these, stepsons succeed except in the case of property given by father to a daughter who is married to a husband of a superior class, in which latter case the children of the rival wife of a superior class take even before the husband.

The author of the Chandrika expressly says that right to mother's Stridhan is not acquired by birth, but at the time of the death of the mother.

SECTION V.

LAW OF SUCCESSION TO STRIDHAN BENGAL SCHOOL.

Jimutavahana and his followers divide Stridhan into the three following classes, for purposes of inheritance:

Classification of Stridhan for purposes of succession.

1. Maiden's property.
2. Ajautaka property.
3. Jautaka and Pitridatta.

With regard to the maiden's property, the heirs are in the following order: *

---

* रिक्थं मृतायाः कन्याया गृह्णीयुः सोदराः स्वयं ।
तदभावे भवेन्मातुस्तदभावे भवेत्पितुः ॥

Dayabhaga, chap. IV, sec III, para 7.

1. Brothers of the whole blood.
2. Mother.
3. Father.

If a female dies before marriage, the property given to her by the person to whom she had been affianced goes back to the giver.

Succession to maiden's property.

2. *Succession to Ajautaka.*

The general rules as to the course of succession to Stridhan apply only to Ajautaka property. The special rules apply to Jautaka and Pitridatta. (Daya., chap IV, sec. II, para. 13) The texts quoted in paras 1-6, sec II, chap. IV of the Dayabhaga apply only to Ajautaka, according to the Bengal authorities. These texts lay down that sons and the unmarried daughters inherit simultaneously, in the first instance. Ib para 9. It has been held that 'maiden daughter' means not only unmarried but unbetrothed, and that a betrothed daughter has no right to inherit mother's Stridhan jointly with a son Sree Nath Gangooly *v* Sorvo Mongola, 10 W. R 488.

Ajautaka property.

If there be no son or unmarried daughter then the mother's Ajautaka property goes to married daughters who have or are likely to have male issue. (Dayabhaga, chap. IV, sec. II, para. 9; Krama Sangraha, chap. II, sec. IV, para. 5.)

In default of married daughters the Ajautaka property goes in the following order—

1.	Son's son ..	Dayabhaga, chap. IV, sec. II, para. 11; Krama Sangraha, chap. II, sec. IV, para. 7.
2.	Daughter's son .	
3	Son's grandson ...	Krama Sangraha, chap. II, sec. IV, para. 9.
4.	Step-son ...	
5.	Step-grandson ..	
6.	Step-great-grandson	
7.	Widowed daughter .	Ib. para. 10.

Order of succession among children.

According to the Dayabhaga, the step-son ought to be placed before daughter's son. (Dayabhaga, chap. IV, sec. III, para. 33.)

Jimutavahana places the widowed daughter after daughter's sons. But the reason assigned for doing so shows that Sreekishen is quite justified in putting the

Points of difference

between the Dayabhaga and Krama Sangraha.

great-grandson before the widowed daughter. The step children are certainly not children. But Jimuta has placed the step-son before even the daughter's sons, and Sreekishen cannot be said to be in direct conflict with the Dayabhaga when he places the stepchildren before the widowed daughter.

According to the text of Devala quoted in para. 6, sec. II, chap. IV of the Dayabhaga, the heirs to Ajautaka Stridhan, in default of children, are—

1. Husband.
2. Mother, brother, father.*

The heirs to Ajautaka in default of children.

Jimutavahana has not, however, made any comment or remark with regard to that part of the text which lays down the course of succession in default of children. According to the text, the husband succeeds before parents and brother. But Jimuta has laid down that the heirs to Ajautaka are—

1. Brother.
2. Mother.
3. Father.
4. Husband.†

There are texts which declare that, in certain special cases, the husband succeeds first of all. There are also texts which declare that in certain other special cases the parents succeed first. Jimuta had therefore no other alternative than to lay down that the general rule is as stated the above Jimuta has deduced the rule from the texts quoted in paras. 10 and 12 of sec. III of chap. IV of the Dayabhaga.

From what is stated in para. 13, sec. III, chap. IV, it appears that, according to Jimuta, the Ajautaka Stridhan of a childless female goes to her brothers and parents, in preference to her husband, whatever be the form in which she may have been married. Sreekishen, however lays down that even in respect of Ajautaka Stri-

---

* सामान्यं पुत्रकन्यानां मृतायां स्त्रीधनं स्त्रीयां ।
अप्रजायां हरेद्भर्त्ता माता भ्राता पितापि वा ॥

Devala.

† See Krama Sangraha, chap II, sec III, paras. 14, 19. Dayabhaga, chap. IV, sec II, para 27

than, the order of succession varies according to the form of marriage. (Krama Sangraha, chap. II, sec. IV, para. 11; commentary on the Dayabhaga, P. C. Tagore's Edition, page 179.)

There is thus an apparent conflict between Jimuta and his commentator. With reference to this apparent conflict, it has been held that the authority of the Dayabhaga must prevail over that of Sreekishen, and that in respect of that kind of Ajautaka which is called Anadheyaka the brother is a preferable heir to the husband. (Hury Mohun Saha *v.* Sonatan, I. L R. 1 Cal. 275)

Apparent conflict between Jimuta and his commentator.

It may, however, be stated here that Sreekishen's doctrine is not only supported by the text of Devala upon which Jimuta mainly relies in support of the position that sons and unmarried daughters succeed simultaneously, but the doctrine of the Krama Sangraha is certainly more consistent with the custom of the country, and the general spirit of the shasters.

According to the shasters, a Hindu is strictly forbidden from accepting any gift either from his daughter, or from his son-in-law. The Aditya Puran says—

विष्णुं जामातरं मन्ये तस्य मन्यं न कारयेत् ।
अप्रजायान्तु कन्यायां नाश्नीयात्तस्य वै ग्टहे ॥
ब्राह्मदेया विशेषेण नैव भोज्यं सदैव हि ।

[The son-in-law ought to be revered as the god Vishnu, and nothing should be done that is likely to offend him. So long as the daughter does not give birth to a son, her father is not to take any food in her house, and where the daughter is married in the Brahmo form, the prohibition is perpetual.]

Such being the injunction of the Shasters, Hindu fathers never accept the most trivial gifts from their married daughters, and if the daughter dies in the house of the father, her ornaments, clothes, &c. are all sent to the husband, even though originally given by the father himself. Even if the father be legally entitled to succeed to Ajautaka, in preference to the husband, still very few would take advantage of that law. The law and religion of the Hindus being derived from the same source, it can hardly be said that there can be any inconsistency between the two in any case. Considering all

this it seems to me desirable that the apparent conflict between Jimuta and his commentator should be explained away if possible, and Sreekishen's view accepted in the matter

Paras. 4, 13, 15, 25, 26, sec. III, chap. IV of the Dayabhaga certainly indicate that, in the opinion of the founder of the Bengal school, the brother, mother and father succeed before husband, whatever be the form of marriage, in which the deceased was married. Taking, however, these paras. in connection with the context, it may be said that Jimuta means nothing more than that the brother may succeed whatever be the form of marriage of his deceased sister. It is nowhere expressly said in the Dayabhaga that the operation of the general rule stated in para. 29 may not be qualified in special cases when the property is Ajautaka. However that be, it must be admitted that according to the authority of the Dayabhaga as intepreted by the decisions of the High Court, the heirs to the Ajautaka property of a childless woman are—

1. Brother.
2. Mother.
3. Father.
4. Husband.

3. *Succession to Jautaka.*

Succession to Jautaka.

The general rules relating to succession to Stridhan apply only to Ajautaka. In respect of Jautaka there are special rules which make the course of succession to such property somewhat different. In the first place, unmarried daughters alone succeed to such property, in the first instance. Manu says—

मातुस्तु यौतकं यत् स्यात् कुमारी भाग एव सः ।

Manu, IX, 131.

[The mother's Jautaka belongs to the unmarried daughter.]

Then again there is a text of Gautama* which declares that Stridhan goes to daughters unbetrothed, betrothed and married. (Dayabhaga, chap. IV, sec. II. para. 13.)

---

* स्त्रीधनं दुहितॄणामप्रत्तानामप्रतिष्ठितानाञ्च ।

Gautama. XXVIII, 22.

The result is, that daughters succeed in the following order where the property is Jautaka:

1. Unmarried daughter.
2. Betrothed daughter.
3. Married daughter
4. Widowed daughter.

In default of daughters of any of the above classes, the son and other heirs succeed in the following order:

1. Son ... } As the daughter excludes the son, so the daughter's son excludes son's son (D. K. S. chap. II, sec. III, para. 9).
2. Daughter's son
3. Son's son ...
4. Son's grandson.
5. Stepson.
6. Stepson's son.
7. Stepson's grandson.

The course of succession to the Jautaka of a childless woman varies according to the form of marriage. It will be remembered that, according to the general rule which applies to Ajautaka, the heirs to a childless female are—

1. Brother.
2. Mother.
3. Father.
4. Husband.

But there is a text of Manu which declares that the Jautaka property of a childless female married in any approved form goes, in the first instance, to the husband. (Manu, IX, 196). The result is that the heirs of Jautaka in such cases are—

1. Husband.
2. Brother.
3. Mother.
4. Father.

Then again there is a text of Manu which declares that the Jautaka of a childless female married in any of the disapproved forms goes, in the first instance, to her parents. (Manu, IX, 197.) The result is that the heirs to Jautaka in such cases are—

1. Mother.
2. Father.
3. Brother.
4. Husband.

After this point there is no difference in the course of succession, on the ground of the property being Jautaka or Ajautaka.

4. *Pitridatta.*

Course of succession to Pitridatta.

With regard to Pitridatta or property given by father before or after marriage, there is a special rule according to which such property goes, in the first instance, to the unmarried daughter alone In the Krama Sangraha, Sreekishen has laid down that the course of succession to Pitridatta is similar to that in respect of Jautaka But, in the author's commentary on the Dayabhaga, he has expressed a different opinion; and considering the wording of the text it is difficult to say whether what is laid down by Sreekishen in his commentary is more acceptable than what is stated in the Krama Sangraha. Property given by father before or after marriage must be regarded as Ajautaka, and the course of succession to such property must be the same as in respect of any other Ajautaka, except so far as the operation of the general rules is qualified by special texts. The special texts* in respect of Pitridatta only declare that such property goes to the unmarried daughter alone in the first instance, and that if the female dies childless, then it goes to her brother. Such being the case, there is no direct authority for saying that all daughters succeed to the Pitridatta before sons; nor is there any clear authority for saying that the course of succession to the Pitridatta of a childless female is the same as that in respect of the Jautaka of such female. In fact, in some manuscript copies of the Krama Sangraha, it is stated that the course of devolution of Pitridatta is similar to that of Ajautaka after a certain point. In the translation and printed copies, the reading is Jautaka instead of Ajautaka.

In the case of Jadu Nath Sircar *v.* Basunta Kumar, (19 W. R. 264) the question arose whether in respect of Pitridatta, the brother is a preferable heir to the hus-

* Manu, IX, 198; Katyana quoted in chap. IV, sec. III, para. 12.

band in every case. If the course of devolution of Pitridatta be like that of Jautaka* then, in certain cases, the husband would succeed before the brother. But in para. 16, sec. III, chap. II of the Krama Sangraha, Sreekishen has apparently laid down, in accordance with the authority of the Dayabhaga, that in respect of Pitridatta the brother is the heir in every case. In the case of Jadu Nath Sircar *v.* Basunta Kumar, (19 W. R. 264) the late Mr. Justice Mitter delivered a very learned judgment in which His Lordship attempted to reconcile the apparent inconsistency in the Krama Sangraha. The learned Judge laid down that the course of devolution of Pitridatta and Jautaka is similar only down to the co-wife's great-grandson. But, in respect of Pitridatta, the brother succeeds before husband, in every case, and not merely in the case in which the deceased was married in the Asura, or any other disapproved form. The mode in which the learned Judge reconciled the apparent inconsistency in the Krama Sangraha is clearly erroneous, as will appear on reference to the original, and on reference to the author's commentary on the Dayabhaga. In the commentary, it is distinctly stated that in respect of the Ajautaka given by the father, the course of devolution, on failure of heirs down to the cowife's great-grandson and widowed daughter, is the same as that in respect of Jautaka, *i. e.*, in certain cases the husband inherits before brother. In fact, there can be no doubt whatever that Sreekishen does not accept the plain meaning of the passage of the Dayabhaga which he has apparently quoted with approval in chap. II, sec. III, para. 16 of the Krama Sangraha. The apparent conflict cannot be explained away in the manner suggested by Mr. Justice Mitter in the case under notice. Sreekishen is clearly of opinion that the devolution of the Pitridatta Ajautaka of a childless female is similar to that of Jautaka. The conflict between him and his master cannot be reconciled except by showing that the text of the Dayabhaga is capable of being interpreted in the manner Sreekishen has done.

As the law now is, the brother succeeds before husband, in respect of Pitridatta, as in respect of other kinds of

* *Vide* D. K. S. chap II, sec. V, para. 3.

Ajautaka, whatever be the form in which deceased proprietress was married.

Immoveable property given by husband.

According to Jimutavahana Stridhan is that property over which a female has absolute power. Dayabhaga, chap. IV, sec I, para. 18. As females have no power to alienate immoveable property given by husband, the question arises whether such property can be regarded as Stridhan. If such property be Stridhan then the course of succession to it would be regulated by the law relating to Stridhan. But if it be not Stridhan then it would be difficult to say what the course of succession to such property is. As Jimutavahana does not lay down any special rules in respect of such property, it must be ncluded under the category of Stridhan. Jimuta's definition of Stridhan must be taken to be supplementary, so as to include also other kinds of property which are declared by express texts to be Stridhan.

Remote heirs to Stridhan.

With reference to the succession of remote heirs to Stridhan, the most important text is that of Vrihaspati* quoted in para. 31, sec. III, chap. IV of the Dayabhaga.

If the order of enumeration of heirs in the text be accepted as the order of succession, then in default of the group of heirs consisting of the brother, mother, father and husband, the course of devolution of all kinds of Stridhan would be as follows :

1. Sister's son.
2. Husband's sister's son.
3. Husband's brother's son.
4. Brother's son.
5. Son-in-law.
6. Husband's younger brother.

---

* मातृष्वसा मातुलानी पितृव्यस्त्री पितृष्वसा ।
श्वश्रूः पूर्व्वजपत्नी च मातृतुल्याः प्रकीर्त्तिताः ॥
यदासां मौरसो न स्यात् सुतो दौहित्र एव वा ।
तत् सुतो वा धनं तासां स्वस्रीयाद्याः समाप्नुयुः ॥
Vrihaspati.

But Jimutavahana and his followers place husband's younger brother at the head of the group; and the husband's brother's sons are placed immediately after husband's younger brother. The result is that the order of succession among the remote heirs is as follows:—*

1. Husband's younger brother.
2. Husband's brother's son.
3. Sister's son.
4. Husband's sister's son.
5. Brother's son.
6. Son-in-law.

In default of remote heirs down to the son-in-law, the husband's father and elder brother succeed according to nearness of connection through the Pinda. In default of Sapindas, the remote heirs called Sakulyas and Somanodakas succeed in the same order as in respect of the property of males. (D K S. chap. II, sec. VI, para. 10.)

The most difficult chapter in the Dayabhaga is that which deals with the order of succession to Stridhan of a childless female. Jimuta has done his best to reconcile the conflicting texts But his exposition of the law is too concise, and would have been altogether unintelligible to the ordinary reader, but for the commentary of Sreekishen From the scattered hints contained in the Dayabhaga, the commentator has worked out the details with marvellous ability. But in doing so, he has, introduced new sources of difficulty by apparently differing from his master, in some cases. Then again Sreekishen has not, in all cases, shown how his conclusions are deducible from the text of the Dayabhaga. The result is, that the law as laid down in the Krama Sangraha and in the Commentary, seems sometimes altogether arbitrary and discordant. I have done my best to give the necessary explanations, in order that the reader may see how the law has been, or may be worked out, for practical purposes. My object has been to make the exposition interesting, and at the same time easy to remember. How far I have succeeded in attaining these objects, is a question upon which it is not for me to pronounce any opinion.

* Dayabhaga, chap. IV, sec. III para 37

INDEX.

---

* It has been shown in the chapter on adoption, that, when a widow adopts a child, she does so on her own account, and not as agent for her husband. At any events, there is no dispute as to the fact that the existence of permission to adopt cannot be regarded as equivalent to conception in the womb. Such being the case, the son adopted by the widow of a deceased person cannot take a vested interest from the date of the adoptive father's death like a posthumous son. It is, therefore, difficult to see on what principle the right vested in the widow is divested in favor of the son adopted by her. The point has been discussed in page 144, but no satisfactory conclusion has been arrived at there. It appears to me now that the widow and the rest can succeed only to the estate of a sonless man. A man cannot be sonless, if there is possibility of his having son. When a son is actually adopted by the widow of a deceased person, he is no longer sonless; and the estate of the deceased not being thenceforth that of a sonless person, it cannot rightfully belong to any one but the son. The existence of male issue is a sufficiently powerful cause to destroy the kind of right which a female can have in the property of her husband. Dayabhaga, Chap. XI, Sec. I, para. 27.

A part of the above reasoning would apply to the case of the son of a disqualified person, born after the death of his grandfather Considering the wording of the texts and commentaries, there can be no doubt whatever that collaterals cannot inherit as heirs to one who is not sonless But if the deceased owner be without a duly qualified son, grandson, or great grandson at the time of his death, then his estate must go to his collaterals, even though there be possibility of male issue being born afterwards. According to Hindu law, property cannot remain without an owner, and succession necessarily opens immediately on the death of the owner. The estate being, under the circumstances, vested in collaterals, it cannot be divested by the subsequent birth of a grandson or great grandson, unless it be allowed that, in such a case, collaterals take only as trustees as in respect of posthumous sons. The ruling laid down by the Bengal High Court in the case of *Kaly Das v. Kishen Das* (2 B. L. R, p. 115) is a necessary consequence of the Dayabhaga doctrine that succession opens immediately on the death of the owner. Considering, however, the inequitable result of the ruling, and considering also that it is inconsistent with the very framework of the Dayabhaga, it seems that there is room for reconsideration.

---

* It has been held by the Bombay High Court that an illegitimate son of a Sudra takes a vested interest by birth in the father's property, and that such son may take the whole estate by survivorship on the death of the legitimate sons of the father. (*Sadu* v. *Baiza*, I. L. R., 4 Bomb., 37)

If the father dies leaving a son by a female slave, and a daughter or daughter's son by a married wife, then they all share in the paternal estate according to the texts of Sanhitas as well as the opinion of commentators. It may, therefore, be contended that the son of a Sudra by a female slave does not take a vested interest by birth in the paternal estate, but only succeeds as heir at the time of [illegible] the father. But, on the other hand, the Sudra's illegitimate son takes [illegible] on by father in his lifetime, or by the legitimate sons of the the [illegible] th. The right to share on partition may, it is true, be regarded a share on [illegible] and not to any joint ownership over the whole such as is father after his d[illegible] as due to special

---

acquired by legitimate sons from the date of their birth. But in the same way the right of legitimate daughters and daughter's sons to share with the illegitimate son may be said to be due to special texts The texts, however, which declare the right of illegitimate sons to share, on partition by father or legitimate brothers, precede those which declare the right of the legitimate daughter and daughter's son to share with the illegitimate son Now, there is a rule of interpretation according to which extraordinary assumptions and far-fetched interpretations ought to be avoided so long as possible. By the application of the rule to the case under consideration, it follows that the right of illegitimate sons to share, on partition by father or legitimate brothers, ought to be regarded as due to proprietary right acquired by birth. The right of legitimate daughters and daughter's son to share with the illegitimate son is to be ascribed to special texts.

The child born of adulterous intercourse is a *kshetraja* son The *kshetraja* is not recognized in the present age, and such son cannot inherit It has been held that the illegitimate son of a collateral cannot inherit (Marsh. 610)

It has been held by the High Court of Bengal that a woman who is kept in continuous concubinage is not necessarily a female slave within the meaning of the texts which declare that the son of a Sudra by a female slave is entitled to inherit. Though the commentary of Sreekishen seems, at first sight, to favor the view that the son of a concubine is entitled to inherit among Sudras, yet the interpretation put upon the text of the Dayabhaga and of the Sanhitas by the Bengal High Court is more acceptable on the ground that it would make the usage and practice prevailing in the country consistent with the law. In Bengal at least, even the lower classes of Sudras seldom, if ever, recognize an illegitimate son as capable of inheriting Such being the case, the view of the law taken by Mr. Justice R. C Mittra in the case of *Narain Dhara* v *Rakhal Gain*, I. L. R., 1 Calc , p 1, seems more acceptable than that apparently suggested by the commentators of the Dayabhaga The existence of an approved custom justifies the postulating of a text of the Vedas, and *a fortiori* it justifies only that interpretation of the texts which makes the law consistent with usage and good conscience.

The interpretation put upon the word *dasiputra* by Mr. Justice R. C. Mittra has not been accepted by the High Courts of other Provinces. It has been held by the High Court of Allahabad, that a child of a continuous concubine is entitled to inherit. (*Sarasutty* v. *Mannu*, I. L. R , 2 All., 134.)

BY THE SAME AUTHOR.

A TREATISE ON HINDU LAW IN BENGALI,

ENTITLED

VYAVASTHA KALPADRUMA.

PRICE RS. 4.

OPINIONS OF THE PRESS.

THIS is a very valuable and admirably written work on Hindu Law.—*Calcutta Review, April* 1884.

THE book is a thoroughly practical one . . is far more useful than any written in English, not to say by Englishmen.—*Amrita Bazar Patrika, 21st February*, 1884.

THERE is not another book like it on Hindu Law.—*Calcutta Sanjivani, 9th February*, 1884.

IT is seldom that we read such an accurate, original, and profoundly thoughtful treatise on Hindu Law as the one recently written by Babu Jogendra Nath Bhattacharya. The treatises on Hindu Law available to English readers are the translations by Colebrooke, Burnell, Tagore, Sutherland and others, the manuals by Macnaghten, Strange, Shyma Charan, and Mayne, and the Tagore Law Lectures by Cowell, Dr Guru Dass, Dr. Trailokya Nath, and Babu Raj Kumar Sarvadhicary. Now it is by no means an easy task for the student to get through all these books, nor is it worth one's while to get through them all. Well, then, if a selection is to be made, which are the books that must be given the preference? The translations preserve the cumbrousness of the original; the works of Macnaghten and Strange have fallen out of date; Mayne's book is more philosophical than practical, and by no means comprehensive, Cowell's lectures have only a literary value, and his exposition of the law is sometimes erroneous, the Tagore Law Lectures by our countrymen are devoted to special subjects, and they are not so practical as they might have been. By a practical treatise on Hindu Law, we mean not merely a digest of cases, but a combination of texts and decisions organized into a symmetrical whole and illuminated by principle, not hypothetical, but read out of the texts. We do not want mere digests like Mr Cunningham's, or merely theoretical dissertations such as constitute the earlier chapters of many of our "Tagore Law Lectures." A book compendious and in the main practical and teaching no principles but what can be distinctly read in the law itself, would satisfy the general want, and such a book is the one before us.

As its title shows, it contains the substance of Hindu Law with reference to Inheritance, Succession, Partition, Adoption, Marriage, and Stridhan. It gives the original Sanskrit texts wherever there may be the least doubt as to the construction, or whenever they afford facilities for discovering a principle, or committing a rule to memory. It gives the more important rulings by the Superior Courts of Judicature. All the law which the student requires to learn, and a considerable portion of the law which the practitioner requires to refer to, would be found here in a short compass.—*Indian Nation, 12th May*, 1884.

Third Edition. Royal 8vo., cloth. Rs. 12; Post-free, Rs. 12-6.

THE INDIAN PENAL CODE,

And other Laws and Acts of Parliament relating to the Criminal Courts of India. With Notes, &c.

Third Edition.

BY THE HON'BLE J. O'KINEALY,

One of the Judges of Her Majesty's High Court of Judicature, Bengal.

Second Edition. Royal 8vo., cloth. Rs. 18.

THE CODE OF CRIMINAL PROCEDURE,

ACT X OF 1882,

TOGETHER WITH

Rulings, Circular Orders, Notifications, etc., of all the High Courts in India; and Notifications and Orders of the Government of India and the Local Governments.

EDITED WITH COPIOUS NOTES AND FULL INDEX.

BY WILLIAM FISCHER AGNEW, ESQ.,

Barrister-at-Law;

AND GILBERT S. HENDERSON, ESQ., M.A.,

Barrister-at-Law,

Author of "A Treatise on the Law of Succession in India."

Second Edition.

BY GILBERT S. HENDERSON.

"To judge from the style in which their present work is edited, the number of cases cited bearing upon the various sections, the ample notes appended where any explanation is necessary, and the full and complete indexes to the cases cited, we have little hesitation in saying that, while undoubtedly it is at present the best work on the subject, it need fear no competition in the future."—*Englishman.*

Royal 8vo., cloth. Rs. 16; Post-free, Rs. 16-9.

THE LAW OF INTESTATE AND TESTAMENTARY SUCCESSION IN INDIA,

INCLUDING

The Indian Succession Act (X of 1865), with a Commentary, and the Parsi Succession Act (XXI of 1865), the Hindu Wills' Act (XXI of 1870), the Probate and Administration Act (V of 1881), the District Delegates' Act (VI of 1881), Acts XII and XIII of 1855, the Regimental Debts' Act, 1863 (26 and 27 Vict., c. 57), the Acts relating to the Administrator-General (Acts II of 1874, XIII of 1875, and IX of 1881), the Certificate Act (XXVII of 1860), and the Oudh Estates' Act (I of 1869).

WITH NOTES AND CROSS REFERENCES.

BY GILBERT S. HENDERSON, M.A.,

Barrister-at-Law, Advocate of the High Court, Calcutta.

"We strongly recommend the book to District Judges, who have had to work Act X of 1865 rather in the dark hitherto."—*Pioneer.*

"Mr. Henderson . . . has furnished the professional and business man with

Fourth Edition. Thick 8vo., cloth. Rs. 18; Post-free, Rs.

THE LAW OF EVIDENCE IN BRITISH INDIA.

By C. D. FIELD, M.A., LL.D.,
Bengal Civil Service,
Recently a Judge of the High Court of Judicature, Calcutta.

This work contains the Indian Evidence Act (as amended by Act XVIII of 1872) and all provisions on the subject of Evidence which are to be found in the Acts of Parliament applicable to India, in the Acts of the Legislative Council of India, in the Acts of the Local Legislatures of Bengal, Madras and Bombay, and in the Regulations of the Bengal, Madras and Bombay Codes, and which are in force and unrepealed by the Evidence Act or any other Act. These provisions of the Statute Law, which constitute the only rules of Evidence now in force in India, are explained in detail, and the history and meaning of the principles contained in them illustrated by the decisions of the Privy Council, of the Courts in England, and of the High Courts in India.

OPINIONS OF THE PRESS.

"This is a very interesting work, and the second edition has increased in bulk threefold as compared with the first. Mr. Field has the capacity of a master, and deals with his subject as one intimately acquainted with it. The history of the Law of Evidence in India will repay study, and, at page 12, Mr. Field begins to trace this history up to the time of the passing of the Evidence Act. . . . We have carefully looked into Mr. Field's work, and our opinion is that it is worthy of the law of which it treats, but it is made additionally and exceptionally valuable by an Introduction, which is an original essay upon evidence in general and Indian evidence in particular. His authorities, of course, are almost exclusively English, but he uses his [illegible]."—*Law Times, 27th September* 1878.

"The object of the Author has been to supplement the new Act with such information as may be necessary to elucidate fully the principles on which the abstract rules contained in it are based; to illustrate the meaning, object, and application of these rules by giving some account of the origin, development, and history of the principles in question; and pointing out the different stages through which they have passed, and the alterations to which they have from time to time been subjected. This purpose is most admirably carried out in the copious notes, accompanying each section of the Code. . . . . . All outstanding rules of evidence expressly saved by the second section of the Evidence Act have been included in the volume; and as these were only to be found scattered through a multitude of different Acts and Regulations of the various Indian Legislatures, the work thus done is both extensive and important. . . . . The work in fact forms a complete Treatise on Evidence in India, arranged side by side with the express law connected with each point referred to."—*Englishman.*

"All this has been done with Mr. Field's usual care; and the copious List of Cases and ample Index render [illegible] book easy of reference and comprehension."—*Indian Daily News.*

"Mr. Field observes with great truth that 'the Codes must be administered by men whose education in law is not merely limited to the letter of the Codes themselves.'—'The rule itself,' he continues, 'will be often misunderstood, where the reason of the rule is not known.' To impart such knowledge, commentaries of this description are of great practical usefulness. . . . . The book bears abundant evidence of the labour and trouble taken in making it a complete guide."—*Hindu Patriot*

Second Edition. Demy 8vo., cl. gilt. Rs. 17-12; Cash 16; Postage 12 as.

LANDHOLDING

AND THE RELATION OF

LANDLORD AND TENANT

IN VARIOUS COUNTRIES OF THE WORLD.

By C. D. FIELD, M.A., LL.D., B.C.S.,

Late a Judge of Her Majesty's High Court of Judicature in Bengal.

CONTENTS.

THE BENGAL TENANCY ACT, 1885,

With Notes and Observations, and an Index.

"We may take it that, as regards Indian laws and customs, Mr. Field shows himself to be at once an able and skilled authority. In order, however, to render his work more complete, he has compiled, chiefly from Blue-books and similar public sources, a mass of information having reference to the land-laws of most European countries, of the United States of America, and our Australasian Colonies."—*The Field.*

"Mr. Justice Field has treated his subject with judicial impartiality, and his style of writing is powerful and perspicuous."—*Notes and Queries.*

"Supplies a want much felt by the leading public men in Bengal . . . will enable controversialists to appear omniscient. On the Indian law he tells us all that is known in Bengal or applicable in this Province."—*Friend of India and Statesman.*

Recently published. 2 Vols. Demy 8vo., cloth. Rs. 12.

COMPARATIVE CRIMINAL JURISPRUDENCE;

Showing, the Law, Procedure, and Case-law of other Countries, arranged under the corresponding sections of the Indian Codes.

BY H. A. D. PHILLIPS, B.C.S.

Vol. I.—Crimes and Punishments.
„ II.—Procedure & Police.

The Notes in this work are arranged under the text of the Indian Criminal Codes, and are taken from the Penal and Criminal Procedure Codes of France, Belgium, Germany, Italy, Hungary, Holland, Denmark, Russia, New York, and Louisiana, from English and American Case-law, Rulings of the Court of Cassation in Paris, and other sources.

PHILLIPS' CRIMINAL MANUAL.

Second Edition, Enlarged: Thick Crown 8vo. *Rs.* 10.

A MANUAL

OF

INDIAN CRIMINAL LAW;

Fully annotated, and containing all applicable Rulings of all High Courts arranged under the appropriate Sections up to date, also Circular Orders and Government Notifications.

BY H. A. D. PHILLIPS, C.S.

CONTENTS.

INDIAN PENAL CODE (ACT XLV OF 1860).

CODE OF CRIMINAL PROCEDURE (ACT X OF 1882).

Evidence Act (I of 1872).
Protection of Judicial Officers Act (XVIII of 1850).
State Prisoners Act (XXXIV of 1850).
Penal Servitude Act (XXIV of 1855).
State Offences Act (XI of 1857).
State Prisoners Act (III of 1858).
Police Act (V of 1861).
Whipping Act (VI of 1864).
Post Office Act (XIV of 1866).
General Clauses Act (I of 1868).
Prisoners' Testimony Act (XV of 1869).
Cattle Trespass Act (I of 1871).
Prisoners Act (V of 1871).
Criminal Tribes Act (XXVII of 1871).
Indian Oaths Act (X of 1873).
European Vagrancy Act (IX of 1874).
Reformatories Act (V of 1876).
Arms Act (XI of 1878).
Railways Act (IV of 1879).
Legal Practitioners Act (XVIII of 1879).
Foreign Jurisdiction Act (XIII of 1879).
Telegraph Act (XIII of 1855).
Penal Clauses of Stamp and Registration Acts.

In Crown 8vo., cloth. Rs. 4-4; Post-free, Rs. 4-8.

OUR

ADMINISTRATION OF INDIA,

AN ACCOUNT OF THE

CONSTITUTION AND WORKING OF THE CIVIL DEPARTMENTS OF THE INDIAN GOVERNMENT,

With special reference to the Work and Duties of a District Officer in Bengal.

BY H. A. D. PHILLIPS, C.S.,

Author of "Manual of Indian Criminal Law," "Manual of Revenue and Collectorate Law."

"A seasonable and reasonable little book. Mr. Phillips is wholly free from the spirit of bigotry and *parti-pris* so abundantly credited to Indian Officials; no one can fail to be struck by the earnest sincerity of the book. Useful as a corrective of much mischievous and ignorant pamphleteering, it will also be of great service to all who cannot command the multitudinous Government Reports, or delve for truth in the Blue-Books"—*Saturday Review, Feb. 6th*, 1886.

"Mr. Phillips has brought together a quantity of really instructive particulars relevant to his subject. The facts which he records must, in the long run, tend to refute the allegations of the sworn enemies of the Indian Service."—*Asiatic Quarterly Review, Jan.*, 1886.

"Mr. Phillips deals with his subject in detail, his survey including the character of Land Tenures, Land-Revenue Settlements, Government Estates, Duties of Collectors, Excise, Revenue and Opium, Acquisition and Registration of Land, and other questions of equal interest and importance. He has clearly shown that the loud outcries which have been sometimes made upon our Indian Government by irresponsible people, imperfectly informed, are deserving of little or no notice."—*Manchester Courier.*

"An adequate exposition of the system of administration in India, free from all official and political bias, yet interesting enough to form a volume that will both please and instruct the reader."—*Mercantile Journal.*

"His object is to instruct the public in the system on which our Empire in India is administered. A valuable and timely publication—a noteworthy and highly creditable contribution to the discussion of Indian questions."—*Home News.*

"The excellent little book which Mr. H. A. D. Phillips has just published will be more especially serviceable to the English reader whose zeal for Indian reform sometimes goes beyond his knowledge of the subject, but it contains a great deal of information which even those who have in a convenient form a fair general acquaintance with the subject, may often find it difficult to lay their hands on. And in one respect in particular Mr. Phillips does good service, by his outspoken reference to evils of which every one is sensible, but few have the courage to denounce."—*Pioneer.*

"In eleven chapters Mr. Phillips gives a complete epitome of the civil, in distinction from the criminal, duties of an Indian Collector. The information is all derived from personal experience. A polemical interest runs through the book, but this does not detract from the value of the very complete collections of facts and statistics given."—*London Quarterly Review.*

"It contains much information in a convenient form for English readers who wish to study the working of our system in the country districts of India."—*Westminster Review.*

"A very handy and useful book of information upon a very momentous subject about which Englishmen know very little."—*Pall Mall Gazette.*

Works by F. R. STANLEY COLLIER, C.S.

Second Edition. Crown 8vo., cloth. Rs. 5.

BENGAL LOCAL SELF-GOVERNMENT ACT

(B.C. ACT III OF 1885)

AND

THE GENERAL RULES FRAMED THEREUNDER.

With Critical and Explanatory Notes, Hints regarding Procedure, and References to the Leading Cases on the Law relating to Local Authorities. To which is added an Appendix containing the principal Acts referred to, &c., &c.; and a full Index.

BY F. R. STANLEY COLLIER, B.C.S.,

Editor of the "Bengal Municipal Manual."

CONTENTS.

Bengal Local Self-Government Act, 1885.
Rules made by the Lieutenant-Governor under the Act
Revised Dispensary Manual. Model Rules of Business.
The Bengal Ferries Act (B C. Act I of 1885).
The Bengal Vaccination Act (V of 1880) and Rules.
The Cattle-Trespass Act, 1871 and 1883
The Local Authorities Loan Act, 1879, and Rules.
The Bengal Tramways Act, 1883.

Second Edition. Revised and Enlarged. Crown 8vo., cloth. Rs 5.

THE BENGAL MUNICIPAL MANUAL

CONTAINING

THE MUNICIPAL ACT (B.C. ACT III OF 1884)

AND

Other Laws relating to Municipalities in Bengal, with the Rules and Circulars issued by the Local Government, and a Commentary.

Second Edition,

Revised and Enlarged.

BY F. R. STANLEY COLLIER, B.C.S.

CONTENTS.

1. The Bengal Municipal Act, B.C. Act III of 1884.
2. Revised Rules for the Election of Municipal Commissioners.
3. Rules for the Preparation of the Annual Administration Report.
4. Account Rules issued under s. 82.
5. Model Rules for the conduct of business at Meetings.
6. Model Pension and Leave Rules.
7. The Municipal Taxation Act, No. XI of 1881.
8. The Hackney Carriag Act, B.C. No. V of 1866.
9. An Act for Registering Births and Deaths, B.C, No. IV of 1873.
10. The Slaughter-House Act, B.C., No. VII of 1865.
11. The Cattle-Trespass Act, No. I of 1871.
12. The Local Authorities Loan Act No. XI of 1879.
13. Local Authorities Loan Rules.
14. Index.

THE

INDIAN LAW EXAMINATION MANUAL.

BY FENDALL CURRIE, ESQ.,

Lincoln's Inn, Barrister-at-Law.

CONTENTS.

...oo Law—Mahomedan Law—Indian Penal Code—Code of Criminal Procedure—Code of Civil Procedure—The Specific Relief Act—Evidence Act—Limitation Act—Succession Act—... Act—Registration Act—Stamp and Court Fees' ... —The Easement Act—The Trust Act—The Transfer of Property Act—The Negotiable Instruments' Act.

OPINIONS OF THE PRESS.

"The experience of the compiler in the learned profession with which he is connected, speaks for the usefulness and importance of the questions that have been put in with a view to prepare candidates for the examination."—*Indian Mirror.*

"This new edition has been rendered necessary by recent alterations in th Code of Civil Procedure, Stamp, Limitation, Registration, and other Acts, a well as by the fact that the first editio was rapidly sold off. We are not ...

TAGORE LAW LECTURES, 1887.

Royal 8vo., cloth. Rs 16; Post-free, Rs. 16-8.

THE LAW OF

TESTAMENTARY DEVISE

AS ADMINISTERED IN INDIA, OR, THE LAW RELATING

TO WILLS IN INDIA.

With an appendix containing—The Indian Succession Act (X of 1865), The Hindu Wills Act (XXI of 1870), The Probate and Administration Act (V of 1881), with all amendments. The Probate and Administration Act (VI of 1889), and the Certificate Succession Act (VII of 1889).

By G. S. HENDERSON, ESQ., M.A.,

Barrister-at-Law.

TAGORE LAW LECTURES, 1885.

Royal 8vo., cloth, gilt. *Rs.* 10 ; *Post-free, Rs.* 10-10.

THE LAW RELATING TO

THE JOINT HINDU FAMILY.

BY KRISHNA KAMAL BHATTACHARYYA,

Late Professor of Sanskrit in the Presidency College of Calcutta.

The Constitution of the Ancient Hindu Family and on the import of the Expression "Joint Hindu Family."
The Origin and Gradual Development of the Joint Hindu Family.
Joint Hindu Family considered as a whole.
On the Managing Member of a Joint Hindu Family
On Limitation as affecting the Rights of the Members of a Joint Family.
On Right to Maintenance.
On the disqualified Members of a Joint Family.
On the Property of Joint Hindu Family.
Alienation of Joint Family Property.
On Son's Liability for Father's Debts.
On Partition.
On Property not liable to Partition.
Presumption in relation to Joint Hindu Family.

TAGORE LAW LECTURES, 1884.

Royal 8vo., cloth, gilt. *Rs.* 12 ; *Post-free, Rs* 12-10.

THE LAW RELATING TO

GIFTS, TRUSTS, AND TESTAMENTARY DISPOSITIONS AMONG THE MAHOMMEDANS

ACCORDING TO

THE HANAFI, MALIKI, SHAFIC, AND SHIAH SCHOOLS

COMPILED FROM

Authorities in the Original Arabic, with Explanatory Notes and References to Decided Cases, and an Introduction on the Growth and Development of Mahommedan Jurisprudence.

BY SYED AMEER ALI, M.A.,

Barrister-at-Law & Author of "The Personal Law of the Mahommedans."

Importance of Mahommedan Law.
The Law relating to Gifts.
Formalities relative to Gifts.
The Revocation of Gifts.
Consideration on *Ewaz.*
The Shiah Law relating to Gifts.
The Law of Gifts according to the Shafic Doctrines.
The Law of *Wakf.*
The *Monkoof Alaihim* or the Objects of *Wakf.*
The Matwalli.
The Powers of the Wakif.
Wakf in favour of non-existing Objects
The Principles of Construction.
The Shiah Law relating to *Wakf.*
The Maliki Law relating to *Wakf.*
The Law of *Wakf* according to Shafic School.
The Law relating to Wills.

TAGORE LAW LECTURES, 1878.

Royal Octavo, cloth. *Rs.* 10; *Post-free, Rs.* 10-8

THE HINDU LAW OF

MARRIAGE AND STRIDHANA.

BY THE HON'BLE. GURUDASS BANERJEE, M.A., D.L.,

Judge, High Court, Calcutta.

I.—Introductory Remarks.
II.—Parties to Marriage.
III.—Forms of Marriage and Formalities requisite for a valid Marriage.
IV.—Legal consequences of Marriage.
V.—Dissolution of Marriage—Widowhood.
VI.—Certain Customary and Statutory Forms of Marriage.
VII.—What constitutes Stridhan.
VIII.—Rights of a Woman over her Stridhan.
IX.—Succession to Stridhan, according to the Benares School.
X.—Succession to Stridhan, according to the Maharashtra, Dravida, and Mithila Schools.
XI.—Succession to Stridhan, according to the Bengal School.
XII.—Succession to Woman's Property other than her Stridhan.

TAGORE LAW LECTURES, 1877.

Royal Octavo, cloth. *Rs.* 10; *Post-free, Rs.* 10-8.

THE LAW RELATING TO

MINORS IN BENGAL.

BY E. J. TREVELYAN, ESQ.,

I.—The Age of Majority.
II.—The Right of Guardianship, Natural and Testamentary.
III.—The Court of Wards.
IV.—Appointment of Guardians by Civil Courts in the Mofussil.
V.—Appointment of Guardians by the High Court.
VI.—Summary Powers possessed by the Courts in Bengal with reference to the custody of Infants.
VII.—Maintenance of Infants.
VIII.—Liabilities of Infants.
IX.—Duties and Powers of Guardians.
X.—Powers of Guardians.
XI.—Decrees against Infants; Ratification of Acts of Guardian; Limitation of Suits; Avoidance of Acts of Guardian; and Liability of Guardian.
XII.—Some Incidents of the Status of Infancy.

TAGORE LAW LECTURES, 1876.

Second Edition. Royal Octavo, cloth. Rs. 12.

THE LAW OF MORTGAGE IN INDIA,

INCLUDING

THE TRANSFER OF PROPERTY ACT,

And Notes of Decided Cases brought up to date.

BY

BABOO RASHBEHARY GHOSE, M.A., D.L.,

Tagore Law Professor.

Revised and re-written to date.

CONTENTS.

Early Notions of Security.
Hindu and Mahomedan Law of Mortgages.
Conventional Mortgages.
Simple Mortgages.
Conditional Sales.
Equity of Redemption.
Usufructuary Mortgage.
Liability of Mortgagee in Possession.
Liens, Legal and Judicial.
Subrogation.
Pledge of Moveables.
Extinction of Securities.

The Transfer of Property Act, with Notes of Decided Cases.

"I take this opportunity to acknowledge the help obtained, in drawing Chapter IV of the Transfer of Property Act, from the work of another acute and learned Native lawyer, Rashbehary Ghose, *The Law of Mortgage in India*."

DR. WHITLEY STOKES,
(*Anglo-Indian Codes, Vol. I, Introd.*)

TAGORE LAW LECTURES, 1875.

Royal Octavo, cloth. Rs. 10 ; *Postage,* 8 *annas.*

THE LAW RELATING

TO

THE LAND TENURES OF LOWER BENGAL.

BY ARTHUR PHILLIPS, ESQ., M.A.,

Barrister-at-Law.

CONTENTS.

I.—The Hindoo Period.
II.—The Mahomedan Period.
III.—Akbar's Settlement.
IV.—The Zemindar.
V.—The Talookdar and other Officers. Assessment of Revenue and Rent, and their Amount.
VI.—The Payment of Revenue. Assignment of Revenue.
VII.—The English Revenue System up to the Permanent Settle-
VIII.—The Decennial and Permanent Settlement.
— in the Position of the Zemindar, Intermediate Tenure-holder, and Ryot.
X.—Relative Rights of Zemindars and Holders of Under-Tenures.
XI.—The Putnee Talook. Remedies for Recovery of Revenue.
—Remedies for the Recovery of Rent. Lakheraj and Services Tenures.

THE TAGORE LAW LECTURES, 1873 and 1874.

In 2 vols. Rl. 8vo., cloth, lettered. Rs. 16. Vols. sold separately, Rs. 9 each; ... *each.*

MAHOME N LAW,

BEING

A DIGEST OF THE LAWS APPLICABLE PRINCIPALLY TO THE SUNNIS OF INDIA.

BY BABOO SHAMA CHURN SIRCAR,

Member of the Asiatic Society of Bengal.

CONTENTS.

1873.

1874.

... subj ... are ti ... of ... a man should ... should know more about it than other ...

... source of knowledge likely to elucidate that subject."—*Indian Observer.*

"The work is admirably 'got up.' In appearance it is all that a law-book should be, and its contents do not belie the promise of a fair outside. They consist of the pith of nineteen Lectures delivered in Calcutta last year by the learned author. . . . . In concluding the present notice we are bound to say that the Tagore Law Lectures of 1874 should form part of every lawyer's library in this country."—*Friend of India.*

CHEAP EDITIONS OF ACTS.

CODE OF CRIMINAL PROCEDURE (Act X of 1882.) With Table of Contents and Index. Royal 8vo. Cloth, Rs. 4; Interleaved, Rs. 5.

CODE OF CIVIL PROCEDURE (Act XIV of 1882.) With Table of Contents and Index. Royal 8vo. Cloth, Rs. 4-8; Interleaved, Rs. 5-8.

INDIAN EVIDENCE ACT; being Act I of 1872, as amended by Act XVIII of 1872. Crown 8vo. As. 12.

INDIAN LIMITATION ACT; being Act XV of 1877, as amended by Act XII of 1879. Crown 8vo. As. 8.

INDIAN STAMP ACT (No. I of 1879). Crown 8vo. As. 8.

INDIAN REGISTRATION ACT; being No. III of 1877, as amended by Act XII of 1879. Crown 8vo. As. 8.

INDIAN INCOME-TAX (Act II of 1886). With Rules by the Government of India and the Bengal Government. Table of Contents. Royal 8vo. As. 12.

INLAND EMIGRATION ACT (No. I of 1882). With Rules, Instructions, Resolution for the working of the Act, by the Revenue and Agricultural Department, the Assam Government, and the Chief Commissioner, Assam. Printed on one side only. Crown 8vo. Cloth. Rs. 2-4. Cash Rs. 2.

BENGAL TENANCY ACT (B.C., No. VIII of 1885). With Table of Contents and Index Royal 8vo. Re. 1.

LEGISLATIVE ACTS,

Published Annually

In Continuation of Mr. Theobald's Edition. Royal 8vo., cloth.

Acts for	Year						Rs.	
Acts for	1872.	With Tables of	Contents	and Index,		Rs.	8	0
„	1873.	„	„	„	...	„	5	0
„	1874.	„	„	„	...	„	5	0
„	1875.	„	„	„	...	„	5	0
„	1876.	„	„	„	...	„	6	0
„	1877.	„	„	„	...	„	10	0
„	1878.	„	„	„	...	„	5	0
„	1879.	„	„	„	...	„	5	0
„	1880.	„	„	„	...	„	4	0
„	1881.	„	„	„	...	„	8	0
„	1882.	„	„	„	...	„	15	8; cash 14
„	1883.	„	„	„	...	„	5	0
„	1884.	„	„	„	...	„	5	0
„	1885.	„	„	„	...	„	5	0
„	1886	„	„	„	...	„	5	0
„	1887	„	„	„	...	„	5	0
„	1888	„	„	„	...	„	4	0
„	1889	„	„	„	...	„		